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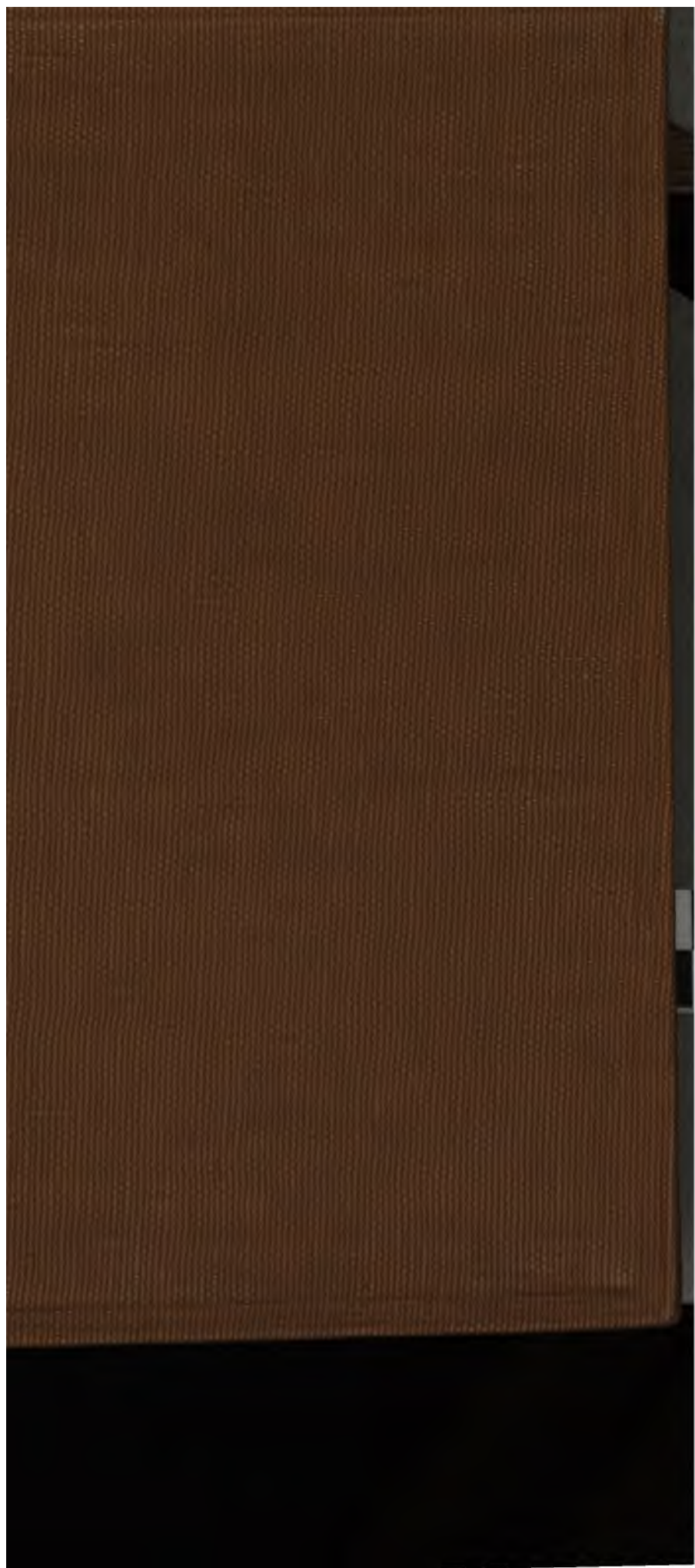
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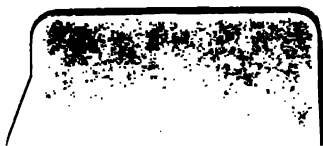
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REPORTS OF CASES
ARGUED AND ADJUDGED
IN THE
SUPREME COURT

OF THE
STATE OF FLORIDA,
AT TERMS HELD IN 1874-'5-'6.

REPORTED BY
WM. ARCHER COCKE, ATTORNEY GENERAL.

VOLUME XV.

TALLAHASSEE, FLA.:
PRINTED AT THE OFFICE OF THE FLORIDIAN.
1876.



JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.

HON. JAMES D. WESTCOTT, JR.,
HON. R. B. VAN VALKENBERGH,* } Associate Justices.

WM. ARCHER COCKE, Attorney-General.

LYMAN B. FOSTER, }
FRED. T. MYERS,† } Clerks Supreme Court.

JUDGES OF THE CIRCUIT COURTS

DURING THE TIME OF THESE REPORTS.

FIRST CIRCUIT— HON. W. W. VAN NESS.‡

SECOND CIRCUIT— HON. P. W. WHITE.

THIRD CIRCUIT— HON. WILLIAM BRYSON.

FOURTH CIRCUIT—HON. ROBERT B. ARCHIBALD.

FIFTH CIRCUIT— HON. J. H. GOSS.§

SIXTH CIRCUIT— HON. WINER BETHEL.¶

SEVENTH CIRCUIT—HON. J. W. PRICE.¶

*Confirmed January, 1875. †Appointed July 16, 1875, *vice* L. B. Foster, resigned. ‡Confirmed January, 1875. §Term expired July 9, 1876; re-appointed *ad interim* July 13, 1876. ¶Appointed *ad interim* April 3, 1875, *vice* James T. Magbee, resigned. ¶¶Term expired July 9, 1876; re appointed August 26, 1876.

1906.

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IN MEMORIAM.

ACTION OF THE BAR OF TALLAHASSEE ON THE DEATH OF M. D. PAPY.

At a meeting of the members of the bar and officers of the court, held in the Supreme Court-room, at the Capitol, in the city of Tallahassee, on Wednesday, 14th day of July, A. D. 1875, for the purpose of paying a tribute of respect to the memory of MARIANO D. PAPY, late a distinguished member of the bar, on motion of R. B. Hilton, Esq., Mr. Justice Westcott, of the Supreme Court, was elected chairman, and J. T. Barnard, Esq., secretary.

On taking the chair, Justice Westcott said:

My Friends and Gentlemen of the Bar:

Death has again invaded the narrow circle of our professional brotherhood. But a few days since, amidst the anguish of his family, the sorrow of his friends, and the regret of the entire community, we bore the remains of the Honorable Mariano D. Papy to the tomb. Throughout this community—in which he lived, in which he was best known, in which he was loved and respected—you have seen abundant manifestation of a deep, a general and a heartfelt sorrow. All seem to realize the fact that his death is a public misfortune. We, as members of the profession which he, while living, honored, are here to-day to render a willing tribute to his memory, and to declare to his family, to his friends, to the judicial tribunals of his native State, and to the members of our profession, the position which he occupied among us as a jurist and a man.

On motion of A. L. Woodward, Esq., a committee of three was appointed, consisting of A. L. Woodward, R. B. Hilton and George P. Raney, Esqs., to prepare suitable resolutions in memory of the deceased.

Mr. Raney, in the absence of Judge Woodward, who was kept from being present by sickness, presented the resolutions of the bar, as follows :

Mariano D. Papy, our lamented brother, having departed this life on Thursday last, after less than an hour's sickness, the members of the bar and other officers of the court have assembled to testify their profound regret at the melancholy and sudden event, and their high respect for his memory.

He was a native of the city of St. Augustine, and in his boyhood came to Tallahassee, where he studied law, and was in 1844, before attaining his majority, admitted, under a special act of the Territorial Council, to practice. Upon the organization of the Supreme Court, he was appointed its clerk, and this position he continued to hold till the year 1850, with the highest satisfaction to the court and the bar. In 1852, Leon county, impressed with the rare promise he gave, elected him to the Legislature, and that body chose him, at the age of twenty-eight years, to fill the high post of Attorney-General of the State. The duties of this distinguished place he performed with great credit to himself and eminent satisfaction to his State. While Attorney-General he represented the State in the case in the Supreme Court of the United States involving the boundary between Georgia and Florida, and during the entire pendency of this controversy was of most valuable service to his State. Though during his life he held positions of public trust, and displayed in them rare abilities and energy, yet it was in the private walks of professional and social life, in managing and protecting the manifold private interests entrusted to his professional or personal care, in doing his duty towards his neighbors, that he was particularly distinguished. His primary intellectual attributes were quickness of perception and readiness of apprehension, with a capacious memory that faithfully retained whatever it received, and held it ever ready for available application. His powers of execution are seldom equalled. His resources were extensive and fertile, and by a great cultiva-

tion of the varied talents with which nature had endowed him, he had long since become not only a learned and accurate lawyer, but a highly cultivated and accomplished man. The bar cordially recognized him as standing among its ablest and most skillful leaders. He was kind and courteous, and possessed a tender regard for the feelings and rights of others. In the private relations of life he did well his part, and few persons so perfectly perform the duties imposed upon them by the ties of blood or affinity, and none ever leave a more loved memory among surviving relations.

In paying this last public tribute to the memory of one who to mortal vision could be so little spared, it is

Resolved, That we feel with a deep sensibility what cannot be soon effaced, the sudden visitation of Providence, by which our lamented brother has been taken away, and with profound sorrow deplore the great and irreparable loss which we have thus sustained; that we will affectionately preserve the memory of his many virtues and high qualities, and will wear the usual badge of mourning for thirty days.

Resolved, That in his death not only has our profession lost one of its ablest, most active and accomplished leaders, but the State one of her most distinguished sons, and citizens and society a most useful and worthy Christian member.

Resolved. That we tender to his bereaved family and relatives the assurance of the sincerest and fullest sympathy in their affliction.

Resolved, That these resolutions be presented to the Supreme Court now in session, with a request that the same be entered upon its records as a token of respect to the memory of the departed, and that the same be presented also to the Circuit Court at its next term in this county for a similar purpose.

Resolved, That the secretary of this meeting is instructed to present the family of the deceased with a copy of these resolutions.

On motion of D. P. Holland, Esq., the resolutions were adopted.

On motion of R. B. Hilton, Esq., George P. Raney, Esq., was requested to present the above resolutions to the Supreme Court at its present term, and also to the Circuit Court for Leon county at its next term.

The hour for opening the Supreme Court having arrived, on motion, the meeting adjourned.

Upon the opening of the Supreme Court on Wednesday,

Mr. Raney addressed the court, announcing the death of Mariano D. Papy, as follows:

May it please the Court—

On the 14th day of June, when this court was last in session, there was seen by many of us now present one of our profession earnestly arguing in this chamber a cause which is still upon your docket. His conviction in the justice of the case, and his desire to protect the rights of his client and friend, seemed to have awakened him to even extraordinary zeal. Since that so little distant time, that voice has been hushed in death—that animated soul and mind have winged their flight upon the morning sunbeams to brighter land, and that form has been laid by weeping friends in the silent grave in yonder cemetery. It is needless for me to say that it is Mr. Mariano D. Papy who has passed away. He died last Thursday morning.

Delegated by a meeting of the profession to present to this court the resolutions commemorative of his many virtues, passed by them, with a request that they be entered upon the record, I should do violence to my feelings if I permitted the occasion to pass without expressing, in some degree, my grateful and affectionate esteem for Mr. Papy.

His death was as sudden as the lightning flash. No continued sickness warned him or his friends that a dissolution was at hand; but for some days previous to his death, an unusual freedom from physical suffering, and even an unwonted brightness, cheerfulness and happiness, seemed to have combined with everything to avert suspicion that the hand of the Reaper would soon take him away. So much was I impressed with his companionableness and kindness the afternoon before his death when in our office, I had listened to him for two hours or more, his conversation taking me with him in intelligent and pleasant wanderings over a broad range of subjects familiar to his mind, that after our separation at evening I found myself in the late hours of that night contemplating the happiness of our relation, and asking what reason there was that it should not

continue for a long, long time. I found to this inquiry no answer but that there could be no cause why it should not last for many years, unless the people should require the exercise of his abilities in a more prominent sphere. Little did I think then, your honors and my fellow members, that to the inscrutable mind of God his days were so fully numbered. The next morning, standing before me in that office, in a posture so often taken by him, he had, without murmur of physical suffering, enunciated to me what he deemed a certain general principle of law, and then commenced writing a letter. In less than sixty minutes I beheld his lifeless form upon his bed in his home, surrounded by a host of agonized relations and friends. Such was the suddenness of his unexpected departure.

Of his talents as a lawyer it is more appropriate that others should speak. The records and reports of this State show his success. His memory seemed never to let go the slightest detail or principle with which his mind became possessed; his apprehension at once seized whatever it was capable of grasping. No sooner did he hear the statement of facts upon which his client sought counsel than his opinion was formed, and it was seldom that he ever changed his first impressions. He continued studious to the day of his death. He was ever frank with his clients and concealed from them no lurking dangers, and never did he hesitate to refuse a case in whose title to success he did not believe or whose justice he doubted. Few lawyers have enjoyed greater personal confidence, or lived more useful lives. His charity was abundant, and the last cause which he plead was in behalf of the wife of one of his former slaves, whom he appeared for in a Justice's Court with all his earnestness and without reward or the expectation of it. To his relatives he was all that could be desired.

His talents were varied and beautiful. Not only to the law had he applied his faculties, but he had drawn largely from literature and art. It was more than delightful to hear him converse upon the marked localities and the monumental structures of the world. His familiarity with the

relative positions, the age, history, use and dimensions of the grand cathedrals, and other places of note, in London and upon the continent, was so great, that it seemed as if he had passed his boyhood at Westminster, or strolled for years through St. Peters, instead of having passed nearly his entire life in Florida.

Leaving his life to others here who will speak of him, I would refer to him as my friend before closing. We met first in 1869. In this chamber, in the spring of 1870, without solicitation, he approached and asked me to participate at the following May term of the Circuit Court in the argument of the first Circuit Court case of importance I had any connection with in Leon county. From that time our intimacy increased, and 1873 we became partners. This partnership soon ripened into a confiding and generous friendship. He was always courteous and ever instructive and kind. Though greatly my senior, not one shadow ever arose from the disparity. His memory, may it please your honors, will ever be among the most cherished and gratifying treasures of my experience, and my young life has known no one who has passed away leaving me a richer legacy of christian example, worth and kindness. I shall miss his morning greeting and his evening farewell, his coming and going; his wisdom in counsel and his alert sagacity at the trial; but above all, his friendly, tender heart, and gentle courtesy. His high attributes and character no one who knew him will ever cease to revere.

Mr. Raney here read the resolutions of the bar, and proceeded—

Such, may it please your honors, are the resolutions that his brethren saw fit to pass. They contain, in the opinion of the committee who framed them, not one word that is excessive or undeserved. It is asked that they may be entered upon your records. Well may we wish that as a blessing to our community it were possible that the mantle of his learning, ability, experience and usefulness might, in all its richness, fall upon some of us.

Mr. Holland said:

May it please the Court—

I have but few words to say, for my brethren here have, in the resolutions presented by the bar, expressed my feelings in honor of the memory of our deceased brother, M. D. Papy. He left us in the glory of manhood's usefulness, beloved by us all, who so intimately knew his virtues. His exalted professional position, honestly won by an industry unsurpassed, and an intellect that few possessed; a lover of his profession, a successful advocate, an honored citizen, a great lawyer and a good man, has gone from this bar, where he and I together labored, sometimes associated in the same cases, and sometimes on opposite sides, for twenty-two years of professional life. In that long period, I knew him well. Many of our brethren have passed away during that time; few are here now who, in January term, eighteen hundred and seventy-three, spoke at this bar in this court. The pages of your records tell the lives of these great and good men, passed and gone. Some were judges, many were advocates, counsellors and lawyers of this land, whose great learning and labors blessed the land they lived in; but amongst them all, there cannot be found one of that great band of men worthy of more honor as lawyer or as man, than our dead brother Papy. Your reports will tell to the bar to come the greatness of the lawyer that has gone. With a practice so extended and a success in his causes so unprecedented, yet, nevertheless, he had a greater honor than to the eye can by the records be shown, to which I bear testimony, that great virtue of the learned lawyer, to-wit: that he prevented litigation by his counsel and efforts, for he never brought a suit in law or equity for court to determine, if the rights of his client could be obtained by amicable arrangements, or by submission to just men outside of a court. He loved not litigation, but he loved justice; the profession he loved so well was to him the means by which he guarded the rights, liberty and lives of the people.

Just himself to all, he required it of others; the weak in

him found strength, the oppressor a foe. All the diamonds of earth, he once told me, could not hire him to prosecute a man for his life; "but as a public officer, he would prosecute, discharging thus," he said, "a duty placed on him by his God and country." No man brought to his daily walk, as counsellor or advocate, a more conscientious desire to do his duty faithfully and honestly. These resolutions are not mere words of praise or flattery of the deceased; they are the truth and nothing but the truth, as they speak of him.

He was much needed here in this land of ours, where such men as him are so much wanted in this day; but he was wanted up yonder more. His Maker called him, and he went to glory. I am not one of those who can grieve at death to such as him. He lives to-day in such transplendent happiness that our mortal eye cannot see the faintest beam of that great joy which he partakes of. Ready when his Maker called him, I know he was, for he was always ready to answer for a life spent in such acts of usefulness as his daily life abounded in.

He has left to us a bright example; there is none to fill his place. It may be my turn next, and would that I could leave this globe with so much love and honor as him. A few weeks ago he and I stood at this bar arguing a great case on the same side. Your honors will recollect the great effort he then made, the tide of learning that so swiftly ran from the vast reservoir of accumulated legal knowledge, which, with an eloquence seldom equaled, this court then heard from those lips now dumb. It was his last great effort—his cause was won, and with a modesty as great as that effort was grand, he went to other causes, and his last, as his partner has told us, was for one who once was his slave.

Great lawyer and good man, who can tell the full measure of his worth, or speak in fitting tongue of our dead brother? Our hearts alone can feel it all; our tongues can only outline the grandness of his character, for while this bar shall last, the name of M. D. Papy will, by it, be spoken with love and honor.

Mr. Hilton said :

May it please the Court—

On looking around this hall, I see no member of the bar (with perhaps the exception of Judge Gwynn) whose acquaintance with the deceased goes so far back as my own. Coming to Tallahassee in 1846, I found Mr. Papy here, then a very young lawyer, and we soon became acquainted with each other as members of a Young Men's Debating Society, then existing in this place. In its debates he exhibited a quickness and clearness of understanding which foreshadowed his subsequent intellectual triumphs. A few years afterwards, removing to another State, we were separated until my return here a little before the late war; nor did we see much of each other during the long anxious years of that struggle. Soon after its termination, I was brought into intimate association with him.

It is doubtless true that our departed brother lacked the benefits of a collegiate education, but that he was *well educated*, whether under his own tutorship or that of others, is, I think, unquestionable. The English language he not only spoke with correctness, but wrote with force and elegance. Spanish he spoke fluently, while his acquaintance with Latin, (some knowledge of which, if not indispensable, is certainly very important to the lawyer,) was sufficient for the purposes of his profession. Nor was he wanting in familiarity with the arts and sciences.

Mr. Papy was undoubtedly a very fine lawyer. The records of this court, and of several of the circuit courts, are the written evidence of the extraordinary success of his professional career; success beginning almost with the very commencement of his professional life, and only ending when that life was closed by death. Even as far back as in 1848 or 9, the very difficult and important case of Barrow vs. Bailey, administrator, &c., (reported in 5 Florida,) was brought and won by him in connection with Mr. Maxwell, who, I think, only became associated with the case after it reached this court. Opposed to him in that controversy

were the combined talents and legal learning of such distinguished names as those of Messrs. Long & Walker, and the ever to be lamented James T. Archer. In that case, and in all the cases which he was ever called upon to conduct, he proved himself equal to the requirements of the emergency—rising with the occasion as its exigency demanded. *Par negotiis et supra.*

The termination of the earthly existence of our deceased brother was sudden, and to us startling; but, fortunate and happy in his life, was he less so in his death? I know it is said by Mr. Benton, in his Thirty Years' View, in that incomparable chapter on the retiring of Mr. Macon from the Senate, in the middle of his third term, on touching the age of three score years and ten, that he "gave to repose at home that interval of thought and quietude which every wise man would wish to place between the turmoils of life and the stillness of eternity." Yet Mr. Benton allowed himself no such interval. Nor need any of us desire it who live, as did he whose death we deplore, wisely and well. The days immediately preceding those of his departure were passed in his usual occupations, in the enjoyment of *unusual* health; his spirits (as I am informed) not only cheerful, but buoyant; his heart ever flowing with gratitude to Almighty God for his manifold blessings, perhaps not unreasonably expecting many years of future usefulness and happiness, yet ready, both as regards his personal preparation and the ordering of his affairs, for the final summons, come when it might; in the possession, up to the last hour, of all his faculties, mental and physical; in the bosom of his family—what death could be more happy or more to be desired?

Let us, my brothers, though we may not attain to his distinction, emulate his virtues, live in readiness as he did for the supreme hour, neither hurrying nor dreading its approach. In the oft-quoted but never trite language of the poet, may *we*

"So live that, when *our* summons comes to join
The innumerable caravan, that moves
To that mysterious realm, where each shall take

His chamber in the silent halls of death,
We go not, like the quarry-slave at night,
Scourged to his dungeon; but sustain'd and sooth'd
By an unfaltering trust, approach *our* graves
Like one that draws the drapery of his couch
About him, and lies down to pleasant dreams."

Mr. Attorney-General William Archer Cocke said:

I feel sad in rising to express my feelings at the death of Mr. Papy. I would ask that I might carefully and tenderly place on the newly-made grave of my friend one bouquet fresh from the field of an honorable and agreeable association formed more than ten years since. I have had frequent professional engagements with him, and always found him able, learned and agreeable.

Mr. Papy filled some years since the office of Attorney-General of this State. I will be satisfied to wear, as one of his humble successors, a portion of the honor that so brilliantly illumined the pathway of the lamented dead while filling the office I now occupy.

It was while engaged at my desk, in the same room that Mr. Papy used while Attorney-General, that the information was conveyed to me that my distinguished predecessor had been stricken down by the hand of death.

Such sudden blows are sad and full of lessons of warning. But it is a comfort to all of us to know that our friend was like the good lawyer mentioned in the Bible—"an honorable counsellor." He was a Christian by faith and practice—a consistent member of the Methodist Church; and I feel disposed to take to myself, and to impress upon my learned brethren now mourning the loss of a departed Christian lawyer, to press to the highest exaltation for the practical business of life, and for the reward of a higher existence, the life and character of an "honorable counsellor" and a Christian lawyer; for in such I feel that I have the example of the distinguished lawyer whose death we now lament.

I cannot speak with the tongue of Tully, yet I feel forced to make reference to a remark attributed to the matchless

and immortal Roman orator, who said of Cato that his refusal to plead a cause before the Roman forum was equivalent to an adverse decision in the case. I think, without exaggeration, Mr. Papy's opinion on any law case stood in this community very near the dignity of a decision of a court of the highest authority.

Mr. Justice Westcott said:

May it please the Court and Gentlemen of the Bar:

Precedent may perhaps prohibit my mingling in the proceedings of the bar upon this occasion; but the circumstances are of such a character, my relations to the man whose life and whose good deeds we are here to review, were so intimate and so pleasant, so entirely friendly and cordial, that such precedent, if such there be, is, in my judgment, more honored in its breach than in its observance. It cannot be wrong for me to bring my humble tribute, my simple offering, to the tomb of this good, this just, this great, this Christian man, who was my friend in boyhood, the friend of my mature manhood, and who now, if those lips still in the deep slumber of death could speak of me, would utter words of kindness and consideration. Not only of myself would he speak kindly, gentlemen, but, if in death those lips would follow the rule of his life, there would be kind and good words there for us all. This was one of the distinguishing characteristics of his life. If he could say with truth nothing good of one, he never found either pleasure or amusement in portraying in terms of exaggeration the faults of his fellow-man. He never thought that self-drawn comparisons, in which his own virtues were brought into bold relief, while the faults of others were given prominence rather than their good qualities, was either consistent with true manliness or any proper standard of gentility and propriety.

In reference to him, whether he is regarded as a brother, a husband, a Christian gentleman, a citizen, a lawyer, or a friend, it may be said that truth is his best eulogy. I know,

we all know, the character of his life in all and each of these relations, and it may be said that in all of them he discharged his full duty. As he, in his youth, was an inmate of my father's family, so was I, in my boyhood, an inmate of his family. I have at all times been welcome at his home and fireside, not as a formal visitor, but as a friend and almost as a relative. I knew him there intimately in his domestic relations. There was no jarring, no discord there; no want of compatibility, no conflicts where there should be affection; there was love, there was affection, there was confidence, there was happiness, as full and complete as is ever given to us on earth. He is gone, and that fireside is desolate; around it are broken hearts who in anguish feel the loss of a father, a husband, a brother. How proper, then, are the words of our resolutions which tender our sympathy to them in such distress. I know that each and every one of us, court as well as bar, feel for those in such affliction, and if to them our sympathy is a consolation, they have it all.

As a citizen and general member of society, he has been with us during his whole active life as a man. Our community, which became his place of residence before manhood, has seen him in this relation. He was scrupulously honest in all of his dealings, and uniformly courteous and kind to all who would permit him to occupy such relations. For those who fancied that he had wronged them and dealt in harsh criticism, he had ever words of kindness and consideration. In all of my intimate association with him, I never heard him wish that evil or misfortune would befall even an enemy. Conscious of the rectitude of his conduct, he trusted to the honest judgment of impartial men for his justification.

Those who knew him as a member of society in his younger days, admit his excellence in this respect. In the polite literature of the day he was well versed. He had a vast fund of information and knowledge of history of his country, and was familiar with the leading incidents in the lives of the great men of his own and other countries.

No idle rumor was ever made the basis of his condemnation, and he always preferred rather to hear something good than evil of his fellow-man. Such was his generous nature and kind heart.

As a lawyer, gentlemen, you have already given in detail the leading characteristics of his mind. This court knew him well. It will miss him much. We know that he was a great lawyer and a good man. His loss in this respect is of a public character. Engaged in the practice of his profession for twenty years, he was acquainted with the business relations of our people and the history of the public works and industries of our State. I knew no man to whom these interests looked with more confidence in his ability and general judgment, not simply as to matters of law, but also with reference to general business management and policy. I was a student in his office, and was subsequently for years his partner, and in all of his professional relations I do not hesitate to say that he was a worthy example to be followed.

He was a self-made man; but that, I think, little praise, as no man can occupy the position which he did except as the result of laborious, earnest effort upon his own part, calling forth all of his energies. No man can be truly great except as the result of his own great effort, and the want of what are generally called advantages is more often a blessing than an evil.

As a Christian, he was humble and yet confident in his faith. The church to which he belonged, his associates there, feel that they have lost one of their best and most useful men. From them he has gone to his God, there to meet the reward of his good works.

Let us imitate his example in all of these respects. We, too, must fall by the wayside, as he has done. We, too, must meet that God in whose presence he now is. When we come to die, if those who stand around our grave can truthfully say, there lies one who, as Christian, father, husband, brother, friend, and lawyer, was the equal of Mariano D. Papy, it will be praise enough.

Judge D. W. Gwynn said :

Mr. Papy has been too well and favorably known in this community for a period of more than thirty years to make it necessary that I should say one word in reference to his many virtues ; but I would perhaps be wanting in my duty, more to the living than the dead, should I fail to give evidence, not so much of his legal learning and professional skill and ability, of which the records of this court bear unmistakable evidence, as of the many virtues which adorned his life in his private and public career through the many years of my acquaintance with him.

In the year 1845, about the period when Florida passed from a Territorial to a State government, I came to Tallahassee, where I soon attached myself to a literary society of which Mr. Papy was then a member. I often met him that winter in debate, and it has been my privilege to see his face and hear his voice every year, and nearly every month in the year, from that period until now.

In the private walks of life, and in his intercourse with his fellow-men, his manner was always pleasant, cheerful and agreeable, with a kind word for every one, and a tender regard for the feelings of the humblest individual, as well as those in the higher walks of life.

As a member of the Florida bar, and standing at the head of his profession, none but the kindest feelings ever existed between him and his brother lawyers, being always alike respectful to the judge on the bench and the youngest and least skillful member of the bar. In my acquaintance of nearly thirty years with the bar of Tallahassee, it is not remarkable that there should have been dissensions and sometimes serious disturbances in the friendly relations of some of its members, but during that long period I have never known Mr. Papy to entertain any unkind feelings to any of his brother lawyers, or to any of the many other persons with whom he was constantly thrown in contact ; and as far as I know, he has not left an enemy in the world.

Mr. Papy has left an example worthy of the imitation

alike of the young and the old. Like many of us, he had not the advantages in early youth of wealth and education, but being possessed of a good mind and indomitable energy, he made his own fortunes and worked his way from poverty and obscurity to fortune and fame.

The mortal remains of M. D. Papy are now resting in the silent grave, and his spirit has gone to the God that gave it; his familiar face and voice will be no more seen and heard in the court-room, or in the social or family circle, but his fame has become a part of the history of his country, and his name will long live in the hearts of the people of Florida; and his virtues as a statesman, a lawyer and a christian gentleman will be held up by parents to their children as worthy of emulation.

Chief Justice Randall said:

I cannot do justice to my own feelings by any utterance I am capable of giving at this time. In viewing the character and career of our departed friend, we scarcely find place for adverse criticism. In all ranks of society we hear but one voice and one tone—a voice of praise and commendation of the life and character, and a tone of sadness and regret that a useful life has been cut short in the hour of its brightest lustre. It happens to all of us, that in our little life, we meet some one whose presence and intercourse are always cheering and pleasant to remember. Such a one was our friend Papy. At the bar, at his office, we found the congenial friend and the lawyer, but in the more delightful place where his social qualities were most conspicuous, his happy home, his hearthstone, his character as a Christian gentleman shone most brightly, and it was apparent to those who best knew him in his domestic life that the light of his home, the centre of his heart's affections, diffused itself always upon his daily path, softening and beautifying his nature, and that the rays reflected from his own heart upon his home kept alive and intensified its delightful atmosphere.

In the active business of life he never forgot the amenities

of pleasant intercourse, while anything approaching angry or harsh disputation seemed to give him painful emotions. His cheery, pleasant manner seemed to enter into the very nature of those who met him everywhere, and we could but reciprocate the heartiness and tenderness of his pleasant address.

Of his splendid qualities as an astute and conscientious lawyer, an earnest advocate, an industrious student, a philosophical reasoner, an acute, high-minded, logical critic, searching and caring less for the defects in the armor of his adversary than for the strength and power of his own position, and of his consequent success in the honorable warfare of his life, I must leave it to others to speak from his open record.

In all the relations of life, in the retrospect of his history, we may well wish that we may have as little need to invoke the merciful mantle of charity upon our actions as do the life and character of our lamented and honored friend. We shall have done well, if at last we deserve the tributes which have been and will be paid to his memory.



ADDITIONAL AND AMENDED RULES.

SUPREME COURT, STATE OF FLORIDA,

WEDNESDAY, January 28, A. D. 1874.

Ordered, That the following rule be adopted, to take effect from and after its publication in the State paper:

RULE 26—When a cause is called for argument at three successive terms, and upon call at the third term neither party is prepared to argue it, it shall be dismissed at the cost of the appellant or plaintiff in error, or the judgment of the court below affirmed, in the discretion of the court, unless sufficient cause is shown for further postponement.

Ordered, That the following additional rules be adopted, viz:

Before proceeding to the argument of a cause, counsel shall furnish to the opposing counsel, if present, a copy of the points of law intended to be presented, together with a list of the authorities relied upon to sustain them, respectively.

Ordered, That the following amended rule be adopted, viz:

It is ordered, that Rule 69 of the Rules of Practice for the government of the Circuit Court, in suits in equity, be, and the same is hereby abrogated, and the following is adopted in the place thereof:

RULE 69.—After the cause is at issue, commissions to take testimony may be taken out jointly by both parties, or severally by either party, upon interrogatories filed, by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex-parte*. In all cases the commissioner or commissioners shall be named by the court or Judge. If either party shall desire that a witness or witnesses, proposed by himself or the adverse party, shall be examined orally, or without written interrogatories, the party offering the witness may, at any time before filing written interrogatories, and the adverse party at any time before filing cross-interrogatories, apply to the court or

Judge for an order for that purpose; and the court or Judge shall, upon such application, reasonable notice thereof being given to the adverse party, make an order naming the examiner and the witnesses to be examined as proposed, and directing that such examiner shall, at such time and place as he may after his appointment select, proceed to take the testimony of such witness or witnesses, after giving to the solicitors for the parties to the cause notice to attend and interrogate the said witnesses. The examiner shall reduce the testimony to writing in the presence of the witnesses, who shall subscribe the same, and the testimony shall be returned by him to the Clerk of the Circuit Court of the county in which the cause is pending, duly certified and sealed up. In cases where convenience may dictate, on account of the residence of the witnesses, the examiner may take testimony at different places. ¶ Two examiners may be appointed, instead of one, if the court shall think advisable. Nothing in this rule shall apply to the examination of witnesses who are examined out of the State of Florida. Subpoenas may issue for witnesses as in cases where testimony is taken upon written interrogatories, and they may be sworn by any examiner or officer authorized to administer oaths.

DECISIONS

OF THE

Supreme Court of Florida.

OCTOBER TERM, 1874.

EZEKIEL E. SIMPSON, APPELLANT, VS. EMELIA J. AND HER HUSBAND, BLAKE J. P. GONZALEZ, ERIC WINTERS AND RICHARD C. WINTERS, BY THEIR GUARDIAN, BLAKE J. P. GONZALEZ, APPELLEES.

1. Under the Constitution of 1868, and the statutes thereunder, the County Court has no jurisdiction to enter and enforce a general judgment against a guardian for a sum in excess of its ordinary civil jurisdiction.
2. Under the Constitution of 1839, and the statutes made thereunder, the Judge of Probate had a general power to revoke the appointment of a guardian of the person and estate of an infant.
3. Where, pursuant to an understanding between the parties, the appointment of one guardian is revoked and the appointment of another made, such proceeding cannot be called in question collaterally. The court having jurisdiction of the subject matter, both the revocation and the appointment are valid; nor is it necessary in such proceedings to give the infant notice, the matter of guardianship being under the exclusive control of the court, the guardian being its officer, and the infant having no right to any particular guardian.
4. Upon such removal, it is a matter of course for the removed guardian to come to an account, and upon his turning over the estate to his successor, he is not responsible for the subsequent wasting of the estate by such successor.

This is an appeal from a judgment of the Circuit Court of the First Judicial Circuit of Escambia county, in which a demurrer to a complaint was overruled. The complaint alleged that Charles Winters died on the first of October, A. D. 1853, leaving considerable estate and three children—Eme-

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lia J., who was then three years old, Eric, who was two, and Richard C., who was eight months. That he left no widow. That Lawrence F. Bronnum administered on the estate, and upon a final settlement on November 1, 1855, there were assets amounting to \$6,804.33, subject to distribution. That on the 23d of October, A. D. 1854, Simpson, the defendant, was appointed by the Probate Court of Escambia county guardian of the persons and estate of the plaintiffs, and on the first day of November, A. D. 1855, he received, as guardian, from Bronnum, as administrator, assets to the amount of \$6,804.33. That, as such guardian, he obtained a decree in June, A. D. 1855, authorizing the sale of the real estate of his wards. That such sale was had, and the sum of two thousand four hundred and fifty dollars was realized therefrom. "That on or about the first day of January, A. D. 1856, pursuant to an understanding between the defendant and Bronnum, the defendant applied for and obtained an order from the Probate Court of said county discharging him from his said guardianship, and the said Bronnum applied for and obtained an order appointing him guardian of the persons and estates of the said Emelia J., Eric and Richard C., and thereupon the defendant turned over to the said Bronnum all the assets in his possession, or under his control, belonging to his said wards, including the proceeds of their real estate, which the defendant had converted into money, as aforesaid, amounting in the aggregate to \$9,424.87." That said Bronnum is a non-resident of this State. That he has utterly wasted and spent the entire estate of his said wards. That the sureties on his bond as guardian, which he executed when he was substituted for the defendant, are, as well as the said Bronnum, insolvent; and that the defendant, Simpson, of all the parties connected with the substitution of the said Bronnum, is the only solvent and responsible party. That the income of their estate was sufficient to maintain them until they were sixteen years of age, after which they maintained themselves. That Emelia

J. intermarried with Blake J. P. Gonzalez, and that he was appointed guardian *ad litem* in this action of Eric and Richard C. Winters. That they were ignorant of their rights in the premises until after the close of the war, the records of the court having been buried during that time. That they have frequently applied to defendant to render an account of the assets, and to pay the said Emelia J. her portion, which the defendant has refused to do.

Plaintiffs pray a reference, and that defendant give an account of his guardianship; that the income of the estate of the infants may be deemed an offset to their maintenance to the time they attained the age of sixteen. That from that period an interest account may be made up, that defendant be adjudged to pay to Emelia the amount found to be due her, and to pay to a guardian of Eric and Richard C., to be appointed to the court, the sums due them respectively.

To this complaint the defendant interposed a demurrer. This demurrer was overruled, with leave to defendant to answer. From the consequent judgment, this appeal is prosecuted, and the following errors are here assigned:

1. That the Circuit Court erred in taking jurisdiction of this case.
2. That an issue of law was tried by a judge in vacation.
3. That judgment upon the demurrer should have been for the defendant, as the complaint did not state facts sufficient to constitute a cause of action.

E. A. Perry, for Appellant.

Points.—1. The Circuit Court had no jurisdiction. Constitution and Acts, 1868, and Statutes then in force, relative to Probate Courts.

Authorities.—Story's Eq. Pl. § 490; 2 Story's Eq. § 1330; 35 Miss. R., 428; 3 Oreg. R., 380; 65 N. C. Rep., 110, 186; 62 Penn. St. Rep., 436; 56 ib. 166; 4 Green Ch., (N. J.,) Rep., 159; 22 Mich. R., 288; 25 Texas, 783; 23 Ark. R.

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93; 12 Rich. Eq., (S. C.) Rep., 196; 2 R. I. Rep., 153; 23 Vt., (8 Washb.) 306; 22 ib., (7 Washb.) 50.

2. The issue of law should have been tried by the court.

Authorities.—Code of Procedure and Amendment; Bouvier's and Blackstone's Definitions of "Court."

3. If the orders of the Probate Court can be avoided, the complaint shows no cause of action against defendant.

Authorities.—Thom. Dig., 210 § 6; 9 Miss., 227; 1 P. Wms., 43; Hovenden on Fraud, 466; LeBaron & Colquitt vs. Fauntleroy, 2 Fla., 276.

4. The orders discharging one and appointing another guardian cannot be impeached collaterally.

Authorities.—Harris vs. Gill, 2 (Md.) R., 42, 50; 2 Wallace, S. C., 210; 3 Wallace, 396; 2 Peters, S. C., 157; 3 ib., 193; 10 ib., 449; 2 Phil. on Ev., Sec. 3 and notes; 4 Amer. Ed.; Tyler on In. and Cov., § 173; 22 Barb. R., 178; 6 Port. (Ala.) 219; ib., 262; 7 Ala., 885; 29 Ala., 542; 41 Ala., 26; 1 Ala., 708; 7 ib., 855; 10 ib., 636; 28 Ala., 164, 218, (overruling 3 S. and P., 355 and 2 S., 331;) 13 Fla., 309; 14 Fla., 162; 11 Ala., 461; 11 Ill., 625.

5. If the orders can be enquired into in this proceeding, the complaint does not state facts sufficient to show them invalid.

Authorities.—Comstock vs. Crawford, 3 Wallace, 396; Grignon's Lessee vs. Astor, 2 How., 319; Perkins Executors vs. Winters Adm's, 7 Ala., 885; Young vs. Lorain, 11 Ill., 633; Hart vs. Bostwick, and other authorities cited supra.; Constitution, 1845; Act of 1845; Act of Feb. 17, 1833; Act of Nov. 20, 1828; Aik. Dig., (Ala.) 251; Rev. St., N. C., 307, § 2; 33 Ala., 214; 1 Haywood, N. C., 303; 2 ib., 336; 1 Murphy, 38, 227, 231; 2 ib., 122; 11 Iredell L., 36; People vs. Wilcox, 22 Barb., (N. Y.), 178; Tyler on In. and Cov. § 173; 5 Porter, 277; 1 Iredell Eq., 136; 2 ib., 565; 11 S. & R., 430; 2 Phil. on Ev., 73, 90, 93; Greenl. on Ev., § 525; 1 Starkie on Ev., 241.

Argument.—The Probate Court's exercise of jurisdiction was called into operation in the first appointment of guar-

dian, and continues while the infants remain the wards, and the guardian an officer of that court.

If concurrent, the court that first acquires shall hold the jurisdiction.

In Florida, neither the Circuit Court nor its Judge has supervisory jurisdiction in matters pertaining to the Probate Court, except on appeal.

If the Circuit Court, by virtue of its equity powers, can exercise an assisting jurisdiction when properly invoked, in this complaint there is no equity not properly cognizable by the Probate Court.

Is this "a matter concerning orphans and their estate?" Is Simpson, as respondents seem to claim, still their guardian, or are they without a guardian, and is it necessary and proper a guardian should be appointed, as they ask? Do they, as wards, complain against their guardian? Is an account required? We see that the Probate Court which has taken jurisdiction over these matters "has power to take cognizance of all matters concerning orphans and their estates, to appoint guardians in cases where it appears necessary and proper, and to hear and determine all complaints of wards against guardians, and require of them, from time to time, an account of the profits and disbursements of the estates," &c. Bush's Digest, 354. The Circuit Court cannot then entertain jurisdiction as a "suit in equity," for there is complete remedy in Probate Court; nor as a court of concurrent jurisdiction can it wrest the jurisdiction from the Probate Court. Story's Eq. Pl., § 490.

But does the Circuit Court, under our constitution and laws, share with the County Court as a Court of Surrogate, Ordinary, Probate and Orphan's Court, the powers expressly and fully granted the latter?

Our constitution gives it full surrogate and probate powers, only subject to appeal; and Sec. 2, Art. 15, of the constitution, and the 16th Sec. of Act of 1868, give it all the powers that were prescribed by law as the powers of the

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Judges of Probate, and imposed upon it all the duties, *except where, by the constitution, imposed upon other officers.*

Then the laws in force at the adoption of the constitution define the powers and duties of that court, and it certainly *shares* none of them with the Circuit Court or its Judge, for such of them, if any, as by the constitution are imposed upon that officer, are, by the act of the Legislature, excepted and taken from that court. Such powers and duties as are left to it would seem then to belong to it exclusive of all other officers or courts, subject only to appeal. So grant of "original jurisdiction in all cases in equity" cannot give concurrent powers—if it gives to one it takes from the other. That, at most, gives chancery powers, and however any of these powers may have been considered in the practice of the English courts, in this State they had become statute powers and could not be embraced in general grant of equity powers.

It may be well to note, that even in England guardianship was not embraced in general equity jurisdiction, but was limited to the Chancellor sitting in chancery. 2 Story's Eq., § 1330. As by our laws it seems to be limited to the Judge of County Court sitting as Probate Judge.

In the absence of any adjudication by this court upon the character of the jurisdiction of the two courts, we may look to the adjudications in other States having courts organized like ours, and with constitutions and laws not greatly dissimilar.

Thus in Mississippi the Supreme Court hold: "Our Probate Courts are established and regulated by our constitution and laws, and their jurisdiction is to be determined by these and not by the practice of the English courts. That jurisdiction was intended by our constitution to be full and ample, and has uniformly been held by this court to be in the main exclusive." 35 Miss., (6 George,) 428.

So in Oregon. The Supreme Court say, "The County Court of Oregon is to be regarded in probate proceedings

as of superior jurisdiction, it being a court of record, deriving its power as a Probate Court from the constitution." 3 Oregon., 380. And "the burden of showing that the court has not acquired jurisdiction is on the party who disputes it." *Ib.*

"The Probate Courts of North Carolina have *exclusive original jurisdiction of a proceeding by a ward against his guardian for a settlement of the latter's accounts*. But they have no jurisdiction of a suit on a guardianship bond." 65 N. C., 110; *ib.* 186.

So in Pennsylvania. "Under the act prescribing the powers and jurisdiction of the orphans' court, that court alone has jurisdiction to settle the accounts of guardians *as between them and their wards*." 62 Pa. St., 436; *ib.* 166.

The Supreme Court of New Jersey hold: "This court has no power to remove an executor; that power belongs exclusively to the orphans' court." 4 Green, (N. J.), 159.

So in Michigan. "The Court of Chancery in Michigan has no power to remove an administrator, the Probate Court having exclusive jurisdiction of the matter." 22 Mich., 288.

In Texas, where a guardian's sale of two slaves was reported to and confirmed by the County Court, and the wards instituted against a subsequent purchaser a suit in the district court alleging ownership, wrongful detention, &c., without making the guardian a party, pending which he settled his account and was discharged, it was *held* that the plaintiff's remedy was in the County Court. 25 Texas, 783.

So in Arkansas. "The Circuit Court, sitting in chancery, has no right to take from the Probate Court the determination of an administrator's responsibility upon the assets of the estate;" and its decree was reversed for want of jurisdiction. 23 Ark., 93.

In South Carolina, "equity has no jurisdiction in case of the fraudulent destruction of a will, whether of real or personal estate; the parties interested under it must seek relief in a Court of Probate." 12 Rich. (S. C.) Eq., 196.

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In Rhode Island, "the Supreme Court will not appoint a guardian after reversing a decree of the Court of Probate dismissing an application for the appointment of guardian, but will remand the case to the Court of Probate for that purpose." 2 R. I., 153.

In Vermont, "the Probate Court has exclusive jurisdiction, in the first instance, of the settlement of guardians' accounts." 23 Vt., (8 Wash.) 306.

And "entire and exclusive jurisdiction of the settlement of estates, to the same extent that jurisdiction of matters of contract or tort is given to the common law courts. The court of chancery has not concurrent jurisdiction in this respect with the probate court, and will not interfere in the settlement of estates except to aid the jurisdiction of the probate court in those points only wherein its functions and powers are inadequate to the purposes of perfect justice, and then in the same degree and for the same reason that it interferes in other cases where the principal jurisdiction is in the courts of common law." 22 Vt., (7 Wash.) 50.

"Claims against an administrator, for money and property of the estate which have come into his hands during the administration, are exclusively within the jurisdiction of the probate court." *Ib.*

In some of the States concurrent jurisdiction in the matters usually pertaining to probate courts is expressly given to other courts, more commonly in those States where there are separate courts of equity, possessing, in addition to general equity jurisdiction, powers specially defined by statute.

Thus in Wisconsin, by statute, there exists concurrent jurisdiction; so in some matters in Alabama; while in New York the Chancellor seemed, under the statutes of that State, to have not merely concurrent but supervisory jurisdiction. That Chancellors Kent and Walworth, in their decisions in the cases of *Andrews*, 1 John. Ch., 99; in *Matter of Nicoll*, *ib.*, 25; *ex parte Crumb*, 2 *ib.*, 439, and the case of *Dyer*, 5 Paige, 534, did not base their claim to such

superintending power upon their general equity jurisdiction alone, but upon the peculiar statutes of the State, appears from their reference to the statutes. See notes *a, b, 2* Kent's Com., 227.

. The New York decisions seem the foundation of the doctrine so far as it has prevailed in this country of the supervising power of the Chancellor in matters of guardianship. Most of the States have limited that supervision to cases of appeal; so, I submit, has our own State.

Grant the Circuit Court's jurisdiction; admit as well the law as the facts asserted in the complaint; let plaintiffs have *all* they pray for, and to what an absurdity, to say nothing of conflict, it would lead! Bronnum would be guardian by virtue of his letters of guardianship from the Probate Court; Simpson would be guardian by election of the plaintiffs, and there would be a third appointed by the Circuit Court. Such would be the result of allowing the Circuit Court any other than appellate jurisdiction.

2. The Code (Sec. 201) prescribes that *an issue of law must be tried by the court*, unless it be referred. See Blackstone's and Bouvier's definition of court. Sec. 202 prescribes how other issues than those named in Sec. 201 may be tried.

Even if this is one of those cases in which, prior to the Code, the Judge, sitting as chancellor, might have passed final decree in vacation, the amendment, Chap. 1,832, Sec. 7, Acts of 1871, is an amendment of Sec. 202, and must be confined to other issues than those enumerated in Sec. 201, and could only apply to issues in this action other than an issue of law.

3. Granting that the Circuit Court had jurisdiction, and the issue of law was properly tried by a Judge at Chambers, the demurrer should have been sustained.

If the orders of the Probate Court can be avoided, the complaint shows no right of action against defendant. It does not surcharge and falsify his accounts, but, on the contrary, shows he "paid over all the assets in his possession

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or under his control," as by the court he was ordered to do, for "an order of court removing a guardian and appointing a successor is equivalent to an order to pay over the money in his hands to his successor," (9 Miss., 227,) shows he paid to the party authorized to receive, viz: the party holding grant of guardianship from the Probate Court of the county in which were the estate and persons of the plaintiffs, then not of age to choose a guardian, which payment, and the receipt of it by plaintiffs' guardian, (and not the order of court discharging him from the guardianship,) discharged defendant from liability. *Thomp. Dig.*, 201, § 6. Even if plaintiffs can, after seventeen years living under their guardian, and acquiescing in all his acts, elect to avoid orders of a court, "entered of record, and not subsequently reversed or set aside," and that too while they are still minors. For as held by Holt, C. J., in *Blackborough vs. Davis*, 1 P. Wms., 43, "the grant, though made contrary to the statute, is not void but voidable, and acts done under it before it is actually avoided will be valid." So also in *Hovenden on Fraud*, 466: "If the grant has been made irregularly or obtained by fraud or surprise." In *LeBaron & Colquitt vs. Fauntleroy*, 2 Fla., 298, this court, in a case analogous to this, adopted the following language of Ashurst, J.: "I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it."

4. But the orders of the Probate Court can neither be avoided nor inquired into in this collateral proceeding. That can only be done by the court that rendered them, or by appeal therefrom. 2 Wallace, S. C., 210; 3 Wallace, S. C. 396; 2 Howard, 319; 2 Peters, S. C., 157, 165, 169; 3 Peters, 193, 202, 207; 2 Green. on Ev., Redfield's Ed., note to § 339; 4 McLean, 442; 13 Fla., 309; 14 Fla., 162-174; 11 Ala., 461-465; 11 Ill., 625-633.

It is seen this court's decision in *Hart vs. Bostwick* is

sustained by all the authorities, and is conclusive of the whole case, and upon that appellant might safely rest.

5. If the orders of the Probate Court can be inquired into in this proceeding, the complaint does not state facts sufficient to show them invalid. Authorities above cited.

It does, however, state facts sufficient to show the jurisdiction of the Probate Court over the subject matter, the guardianship, and the person removed, and that the court had been called upon to exercise its jurisdiction. 2 Howard, 533; 2 Wallace, 216; 7 Ala., 864, and other cases cited.

It does not show that defendant's appointment, being a temporary one to represent the estate in the settlement of administrator's accounts, had not expired by limitation at the time of his discharge.

It does not show that the removal of one and appointment of another guardian was not for the best interest of the infants; that Bronnum was not, as their nearest relative, entitled to the office rather than Simpson, a stranger.

But consider these orders upon respondents own grounds. In the trial below they rested their case upon two main propositions:

1. Denied the power of the Probate Court in Florida to displace or discharge a guardian.

2. They claimed that the order of discharge, and subsequent order of appointment, are void, in consequence of that want of power, and because the infants were not served with process and represented by guardian *ad litem*.

Sec. 9, Art. 5, Constitution of 1845, gave the Legislature power of providing for appointment of "officer to take probate of wills, to grant letters testamentary of administration and guardianship, to attend to the settlement of the estates of decedents and of minors, and to discharge the duties usually pertaining to Courts of Ordinary, subject to the direction and supervision of the Courts of Chancery, as may be provided by law." Thomp. Dig., 57.

By virtue of that power, the Legislature did provide for

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the appointment of such officer, to be called Judge of Probate, to perform the duties above enumerated; and it further provided by law how the Courts of Chancery should exercise the direction and supervision mentioned in the Constitution, viz: by appeal. Act July 25, 1845. Thomp. Dig., 57.

In the same act the Legislature provided that the Judge of Probate should have all the powers and perform all the duties theretofore prescribed by law, as powers and duties of Judge of County Court when acting as Court of Ordinary. Thomp. Dig., 58, § 3.

Refer to act of Feb. 17, 1833, to ascertain the powers and duties of Judge of County Court when acting as Court of Ordinary. He "had the power either in open court or vacation to take probate of wills, grant and revoke letters testamentary and letters of administration, *appoint and displace guardians* of infants," &c. Duval's Compil., 276.

That the Legislature intended to and did invest Probate Judges with power to displace or discharge guardians, see the same act of July 25, 1845, Secs. 4-5, which required him to record, &c., all orders and decrees made by him in relation to estates, "*the appointment of guardians and the revocation of such appointment.*"

All these acts are in conformity to, or in the words of Sec. 1, Art. 17, are "not repugnant to the provisions of" the Constitution, (Constitution 1845,) for the framers of the Constitution are supposed to have had in view what powers and duties pertained to Courts of Ordinary, not only in the Territory of Florida, but according to the common law of America, if not of England. We have seen that in Florida Courts of Ordinary had power to appoint and displace, (which Webster defines discharged,) so we find in the common law of America the Judge of Probate, or officer of same character, has the same power to appoint and to remove. 2 Kent Com., 37, and in 1 Bouvier's Inst., 147, § 360, "A guardian may be discharged at his own request."

See Aik. Dig., 39, for clause in Alabama Constitution, under which the statute from which the Florida statute seems to have been copied was passed. Aik. Dig., 251, § 26.

See North Carolina statute; Rev. Stat., N. C., 307, § 2, and statutes and practice of other States. See reports of of other States for instances of the exercise of similar powers by Probate Courts.

The court having power to displace, it is claimed the orders should have been made only on complaint of wards. We find no such restriction to court's power in the statutes above cited; nor do we in an older statute, which plaintiffs seem to have had in view, (the act of November 20, 1828, Thomp. Dig., 225, § 2,) and to have wrongly construed. Properly construed, it is another statute, giving power to displace, as the court displaced defendant. It requires the Judge of Probate, 1st, to hear and determine all complaints of wards against guardians; 2d, to require of them counter security, *when necessary*, (not when the wards complain;) 3d, displace them (not upon complaint of wards,) but when *to them* it may seem equitable and right. This statute, instead of restricting power, places the whole subject matter of guardianship within the discretion of the Court of Probate.

Indeed it would seem self-evident that court's power to displace a guardian against his will, included power to do so with his assent. But as to this objection, see 3 Wallace, 403, 404, and 11 Ill., 633. But counsel for plaintiffs at the trial below argued that court never granted a discharge to Simpson—contended it was a resignation. The complaint does not so charge; it alleges that "defendant applied for and obtained an order from the Probate Court discharging him." There is material difference.

Resignation is exercise of party's privilege; discharge is exercise of court's power; and the demurrer is to a complaint alleging a discharge, or the exercise of the court's power. So if court's power is shown, it is conclusive, for "whether its decision be correct or otherwise, its judgment, until re-

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versed, is binding on every other court." 2 How., 343, and authorities cited.

But plaintiffs objected to the validity of these orders, because the infants were not served with process and represented by guardian *ad litem*. This objection, as indeed are all the others, as well as the argument and authorities presented in behalf of plaintiffs, is predicated upon the hypothesis that the infants were necessary parties to these orders, to the determination by the court as to who should and who should not be guardian. The complaint does not show that. It shows they were respectively five, four and three years old, and could neither by themselves, nor by others, have any voice in the determination of a matter that was absolutely and exclusively within the discretion of the Judge of Probate. 33 Ala., 214; 1 Haywood, N. C., 303; 2 ib., 336; 1 Murphy, 38, 227, 231; 2 ib., 122; 11 Iredell L., 36; 22 Barb., N. Y., 178; Tyler on In. & Cov., § 173, and authorities generally.

This case was argued as if these orders were orders or judgments against the infants, or as if the complaint surcharged a final settlement, and these were orders purporting to relieve defendant from liability for his acts while guardian, and not simply orders determining who shall and who shall not hold an office purely within the gift of the Probate Court, for guardianship is an office, (8 Cowen, 355,) and the guardian derives his power, not from an act of the ward, but by appointment of the court. 5 Porter, 277. To this office, it does not appear these plaintiffs had the shadow of a claim. The complaint shows no parties claiming a right to the office other than Simpson and Bronnum; Simpson, by reason of an appointment, (which may have been an "improvident one," and thus revocable by the Judge of Probate, without statute power—1 Williams on Exec., 484, note 2)—and Bronnum by reason of his being the nearest relative of the infants; which fact, though it does not affirmatively appear from the pleadings, the court may infer, from his having ob-

tained the grant of administration. (2 Phil. on Ev. 85.) If, then, we apply the principles applicable to proceedings *in personam* to these orders, and adopt Bouvier's definition of parties, and Story's doctrine as to necessary parties, there were before the court all the "parties directly interested in the subject of the suit," viz: the office of guardian. A creditor or a debtor of the estate has, in proportion to his credit or debt, as much interest in the estate, and is as necessary a party to, and might as reasonably be permitted to impeach these orders, as the plaintiffs.

But the courts of England and America, and a long and uniform practice, have established a different principle, as applicable to sentences or decrees of Ecclesiastical Courts in England, and of courts coming in place of them in this country, whether called Court of Surrogate, Judge of Probate, Orphans' Court or Ordinary. And it is this: When those sentences or decrees are upon a subject matter within their jurisdiction, and confer upon or deprive a person of a *status* or legal character, they are in the nature of proceedings *in rem*, and have a conclusive effect even with respect to persons who are not parties to the proceedings.

2 Phil. on Ev., 4 Amer. Ed. 73, 74, and note top of page 79. "And they have the effect of establishing conclusively such state and legal character against all persons;" (ib., 90, 93; also, 11 S. & R., 430; 1 Greenleaf on Ev., § 525; 1 Stark. on Ev., 241; 2 Howard, 338; 6 Porter, 219; 2 Peters, 168.)

This explains why no cases can be found where letters testamentary or of administration or guardianship have been held void, voidable or inconclusive, against legatees, distributees, infants or creditors, because they, however much interested in the estate and its proper administration and management, were not parties of record to the proceedings by which the legal character or *status* of those respective officers was conferred.

That this doctrine was fully recognized in Florida at the

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date of these orders, see all the statutes, *pari materia*, in force on the 1st of January, 1856.

For instance, that giving power to the Probate Court to grant probate of wills, letters testamentary, and of administration and guardianship, (Thomp. Dig., 195;) also, to authorize the loan of money of minor, (Thomp. Dig., 207, § 2;) and the sale of real estate of minor, (Acts 1850-1, p. 129.)

So, too, as in proceedings *in rem*, any person, whether party to record or not, feeling aggrieved by any order of that court, could intervene and take appeal to the Circuit Court. Sec. 46, Act Nov. 20, 1828; Duval Com., 180; Act 1845; Thomp. Dig., 365.

The court's power then being complete and the infants not being necessary parties to the record, that power was brought into exercise, and "the granting" the orders "is an adjudication upon all the facts necessary to give jurisdiction, and whether they exist or not is wholly immaterial, if no appeal is taken. The record is absolute verity, to contradict which there can be no averment or evidence." 2 How., 340.

This, and the maxim *de fide et officio judicis non recipitur quaestio*, and the language of this court in 11 Fla., 137: "The law having entrusted to the courts the administration of justice, it is always presumed that every tribunal, by whom a cause has been tried, has done what was right," and the decision of this court in Hart vs. Bostwick, are full answers to all the objections alleged against these orders, and fully justify the conclusion—

That the order discharging Simpson and vacating the office of guardian, and the subsequent order appointing Bronnum, until revoked by the court that made and placed them upon its records, or reversed by an appellate tribunal, are, in every court in this State at least, conclusive against the world to show that on the 1st day of January, 1856, there was taken from Simpson and conferred upon Bronnum the "legal character" of guardian of Emelia J., Eric and Richard C. Winters; and that this defendant, when he "paid over all

the assets in his possession" to the guardian of those infants, discharged all his liabilities to them or to their guardian.

This appellant does not, by the order discharging him from the office of guardian, seek to cover any charge that may be made of unfaithfulness in his duties while he held the office; on the contrary, he invites the closest scrutiny into his acts and accounts; but he does claim that he had a right to be guided by the laws and principles of practice in the courts at that time, and especially by the decision of this court in the case of LeBaron and Colquitt vs Fauntleroy, which arose in his own county; and he protests against being punished to-day for doing on the 1st day of January, seventeen years ago, what he would then have been punished for not doing; and he also protests against being made the pivot upon which is to move the vast revolution and reform in the practice of Probate Courts, which, in behalf of the plaintiffs, the judge at the trial below was so strenuously urged to inaugurate.

As to the special ground of demurrer, it will readily appear that the points made and authorities cited above, apply with still more force to the special ground of defect of parties. No court would presume to inquire into Bronnum's appointment in a proceeding to which he is not a party. 11 Ala., 465. And unless the Circuit Court can do that, and has power to repeal his letters in this proceeding, the prayer of the complaint cannot be granted. 2 Phil. on Ev. 106; 3 Gill and John., 103, 113; 18 Ala., 34; 17 Ala., 119.

It was argued in the trial below that the complaint alleging Bronnum to be out of the State, the maxim, *lex non cogit ad impossibilia*, was answer to special ground of demurrer. He is an indispensable party here, and it will be seen by reference to Story's Eq. Pl., §§ 81, 82, 83, the impossibility of making him a party, if it existed, would be no excuse.

The appellant contends that, clearly upon this ground, if there were no other, the demurrer should have been sustained.

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Richard A. Campbell for Appellees.

The question arising upon the demurrer is, whether the order of the Probate Judge did, in law, discharge appellant from his office and responsibility of guardian. The appellees maintain the negative—

1st. Because the Probate Judge could not constitutionally grant such an order.

2d. The order was unauthorized by the statute law.

3d. It was void because it was granted in a proceeding to which the appellees were not parties, and of which they had no notice.

4th. The order was in effect only an acceptance of the resignation of a guardian, and therefore the unauthorized official sanction of a nugatory act.

5th. It was the result of an agreement to which the appellees were not parties.

6th. The understanding between appellant and Bronnum, coupled with the orders and the acts of the parties under and in connection with them, made Bronnum appellant's agent.

First. The Judge of Probate could not constitutionally grant an order discharging the appellant from his office and responsibility of guardian.

The 9th section of Art. V of the Constitution of 1845 declared that "the General Assembly shall provide by law for the appointment in each county of an officer to take probate of wills, to grant letters testamentary, of administration and guardianship; and to attend to the settlement of the estates of decedents and of minors, and to discharge the duties usually appertaining to Courts of Ordinary, subject to the direction and supervision of the Courts of Chancery, as may be provided by law."

The office of Judge of Probate was, therefore, one of limited powers. 5 Paige, 534; 1 John. Ch. R., 99; 3 Sum. C. C. R., 338; 1 Curtis C. C. R., 457.

In matters relating to infants, two powers only are con-

ferred on him: 1st, to grant letters of guardianship; 2d, to attend to the settlement of their estates.

The enumeration of certain powers is an exclusion of others not enumerated. Cooley's Con. Lim., 64.

The only other powers which Judges of Probate could enjoy in matters relating to infants would be such as arise by necessary implication from the powers expressly granted. 1 Kent, 346, 520; Cooley's Con. Lim., 63-4.

But only such powers could arise by implication as are necessary to execute the express powers. *Ib.*

The power to discharge does not arise by necessary implication from the power to grant letters of guardianship. 5 Paige, 534.

Besides, the appointing power had been exhausted by securing an efficient and responsible guardian. 6 Ga., 432.

The power to settle the accounts of such guardian could not raise by implication the power to remove him, much less to discharge him from office and responsibility upon his mere resignation.

The implied powers of the Judge of Probate, resulting from the express constitutional authority to attend to the settling of the estates of infants, will be found in sec. 37, Act Nov. 20, 1828, (Thomp. Dig., 210.)

To appoint guardians; to call them to account; and to discharge or remove them, are three distinct and substantive chancery powers. 2 Kent, 236-7; 1 Sto. Eq. Ju., § 446; 2 *ib.*, § 1338-9; 21 Ala., 363.

The 8th section of Art. V of the Constitution of 1845 gave original equity jurisdiction to the Circuit Courts until Courts of Equity should be established.

The power to remove and discharge not having been granted to the "officer" created by the 9th section, it passed as a part of its chancery jurisdiction to the Circuit Court under the 8th section of Art. V of the Constitution of 1845.

"The duties usually appertaining to courts of ordinary," referred to in the 9th section, Art. V, of the Constitution of

1845, do not embrace either equity or common law judicial powers.

The term "courts of ordinary" is used in its American sense, and as a designation of courts exercising such special powers as the statute law confers on them. 2 Bo. Dic., 270.

The duties and powers of such courts could not be compressed within the limits of the common law definition of courts of ordinary, nor could they be so expanded as to make all the laws of the several States conferring powers on their respective courts of ordinary rules of action for the Probate Judges of Florida.

The words, "*duties usually appertaining to Courts of Ordinary*," are only indicative of a class of duties which the Constitution provided should be imposed by the statute law of the State on the officer designated; those duties being of a like character with those imposed by other States on their courts of ordinary.

If, then, the power to discharge a guardian is a chancery power, it was not embraced amongst "the duties usually appertaining to a court of ordinary."

Two good reasons existed for withholding from the Probate Judge the power to discharge:

1st. To afford the rights of the infant an additional safeguard by securing to him the judgment of a court of chancery upon the expediency of continuing the guardian in his trust, instead of leaving it to the appointing judge to review the qualifications of his own appointee.

2d. To secure to the infant the safeguard which the forms of equity afford in case the guardian sought relief from his trust.

This case illustrates the wisdom of withholding the power of removal and discharge from the Probate Judge.

Second. The order was unauthorized by the statute law.

The act of the 25th July, 1845, (Thomp. Dig., 57-8,) in carrying into effect the 9th section of the Vth Article of the Constitution, employed the language of the section in bestowing their powers on the Probate Judges.

The 1st section of Art. XVII of the Constitution of 1845 continued in force all laws not contrary to its provisions.

In 1845, when the Constitution took effect, the only legislation in relation to infants and guardians was contained in the 1st, 37th and 50th sections of the act of Nov. 20th, 1828, (Thomp. Dig., 210, 224-5.)

The first clause of the 1st section of the act of 1828 provides for the hearing and determination of complaints by wards against guardians, for counter security, the displacement of guardians, and the making of such orders as may seem equitable and just. The second clause of the section requires the guardian to make inventories of receipts and disbursements of the ward's estate, and directs the Judge to make such orders as may be just.

Everything authorized to be done under the first clause of the section (displacing the guardian as well as the rest) must be founded on a complaint by the ward.

When we ask from whom counter security was to be exacted; who was to be displaced; in relation to whom orders were to be made? the only answer that comes from the law is, the guardian against whom complaint has been made.

In this case, there being no complaint, there was wanting "the act required to call into exercise the power of the court." 3 Wall, 396.

The 37th section of the act of 1828 relates to enforcing settlements by guardians and others.

The county courts, being courts of equity, (Düval Comp., 89, 90, 130, 270,) were empowered by the 50th section of the act of Nov. 20th, 1828, "to take cognizance of all matters concerning infants and their estates." But the "officer" created by the 9th section of the Vth Article of the Constitution of 1845 was intrusted with only two chancery powers.

The provision in the act of 25th of July, 1845, (Thomp. Dig., 58,) for recording "the appointment of guardians and the revocation of such appointment," must relate to revocations to be made by the Circuit Court, unless the 1st section

of the act of 1828, relating to the displacement of guardians upon "complaint," may be construed to confer a limited power of revocation.

The power of revocation, *eo nomine*, is bestowed on the county court by the 31st section of the act of 1828 in the cases of executors and administrators, but it is silent as to guardians. *Thomp. Dig.*, 210.

The power of revocation implies action on the part of the Probate Judge to protect the interests of those interested in the estate against misconduct or inefficiency. 14 Fla., 162.

The power the Judge attempted to exercise in this case was to *discharge* the guardian from office and responsibility at his own instance and for his own benefit.

The power to discharge executors and administrators from office and responsibility has, under certain restrictions, been bestowed on the Judges of the Court of Probate. (*Thomp. Dig.*, 211-12.) But in no form, nor to any extent, has it been bestowed in the case of guardians. The reason is obvious.

The duration of the office of administrator or executor is the time required for a complete fulfillment of the trust. 1 Fla., 332.

The duration of a chancery or statutory guardian's office is the minority of the ward. 2 Kent, 236; 1 John., 24. The attainment of majority by the ward works the guardian's discharge from office; and the surrender of the estate to the ward constitutes the guardian's discharge from responsibility.

Even a court of chancery would not have done what the Probate Judge attempted to do; for it only *removes* guardian's "whenever sufficient cause can be shown for such purpose. In all such cases the guardianship is treated as a delegated trust for the benefit of the infant, and if it is abused or in danger of abuse, the court of chancery will interfere." 2 Story Eq. Jr., § 1339.

Third. The order of discharge was void because it was granted in a proceeding to which the appellees were not parties and of which they had no notice.

The proceeding was obviously for the benefit of the guardian only; for its whole object was to abrogate a contract into which he had entered to take care of the persons and estates of the appellees during their minority. 2 Kent, 236; 1 John. Ch. R., 25.

That benefit he sought for himself, at the *immediate risk* to his wards of exchanging an efficient and faithful guardian for a faithless one, with the ultimate consequence of a loss of their entire estates.

Here was a proceeding involving benefit to the party who was pressing it to a final order; and here was injury to parties who were denied the opportunity to be heard.

Did not the proceeding in the Probate Court involve all those circumstances which render notice of actions and suits a condition precedent to the right of a party to ask for, and to the power of the court to grant, a judgment or decree? 2 Fla., 207; 14 How., 334.

The power to remove or discharge guardians being a chancery power, (2 Sto. Eq. Jr., § 1338-9; 2 Kent, 236-7,) must be exercised with regard to the rules and practice of courts of chancery. 21 Ala., 363.

If the Probate Judge possessed the power, it was his duty to issue process to the appellees and to appoint disinterested guardians *ad litem* to represent them. 2 Fla., 594.

Infants are as much entitled to process as adults. 2 Arch. Pr., 156; 1 Daniel Ch. Pr., 204; Tyler on In. and Cov., 203; 24 Miss., 154.

They must be made parties, with notice actual or constructive, to every proceeding in which their rights may be injuriously affected, as in the probate of a will of real estate, (1 Curtis C. C. R., 417;) the distribution of an estate, (5 Ala., 40;) in the appointment of a guardian, (7 Paige, 362,) and in the audit of a voucher, (39 Ala., 150; 43 Ala., 148; Thomp. Dig., 208.)

After process, they are entitled to disinterested guardians *ad litem*, specially appointed by the court, to protect their

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interests. 8 Peters, 128; 10 Paige, 41; Tyler on In. and Cov., 206-7; 21 Ala., 363; 1 Curtis C. C. R., 417.

In one class of cases, judgments and decrees have been held irregular and *voidable at the election* of the infant, because after notice no guardians *ad litem* were appointed. 1 Am. Ld. Ca., 256; Tyler on In. and Cov., 204; 6 Dana, 87; 3 Marsh, 252; 21 Ala., 363.

By the notice, in this class of cases, the jurisdiction of the court was deemed to have attached to the person of the infant; the want of a guardian *ad litem* was an error only and that error could be corrected by a writ of error, bill of review, or appeal.

In another class of cases, judgments and decrees against infants have been held irregular for want of notice, although the infants were represented by guardians *ad litem*. 25 Ala., 507; 2 Marsh, 166.

In the second class of cases, the infant being before the court by a guardian *ad litem* of the court's appointment, its jurisdiction attached to the person of the infant. Such appointment, however, being without previous notice to the infant, was an error; but that error could have been corrected by a direct proceeding, and therefore the judgment was voidable only.

But where there has been neither notice nor the appointment of a guardian *ad litem*, the judgment or decree against an infant is void for want of jurisdiction over his person. 1 Hill (N. Y.), 130; 39 Ala., 150; 43 Ib., 148; 2 Fla., 207.

Who can say that the estate of these infants might not have been saved by a word of warning from a disinterested guardian *ad litem*? Who denied them the opportunity of having that warning uttered in their behalf?

Fourth. The order of discharge was only in effect an acceptance of the resignation of the guardian, and therefore the unauthorized official sanction of a nugatory act.

Appellant entered into a contract by which he bound

himself during the entire minority of the appellees to take care of their persons and estate.

In entering into that contract appellant accepted "a most delicate and important trust." 1 Sto. Eq. Jr., § 317; 1 P. Wm., 105.

And he riveted that trust upon him by the acts in pais of taking possession of the appellees' estate, and converting their realty into money.

A trust thus once accepted cannot be resigned or renounced. Hill on Trustees, 327-8, (marginal 221-2); 4 Kent, 329; 2 Scho. & Lef., 220; 3 Fla., 132.

In some of the States trustees under statutory regulations may resign.

In this State the common law rule is unimpaired by legislation.

The resignation of appellant was a breach of "a most delicate and important trust," which the sanction of the Probate Judge could not legalize.

The conclusion is manifest. The act of the guardian was illegal; the action of the Judge, founded exclusively on the action of the guardian, was unauthorized; and, therefore, the joint action of Judge and guardian wrought no change in the relations and responsibilities of the former to his wards.

Fifth. The order of discharge was the result of an agreement to which the appellees were not parties.

The renunciation of appellant, his discharge, and the appointment of Bronnum, were three acts of one scheme, in which we might rationally embrace the sale of the real estate, occurring as it did only a few days before the resignation.

Essentially the transactions have a unity, and stood in contemplation of law just as though the two orders were embraced in one, with a recitation that it was made pursuant to an agreement of the parties to it.

A judgment or decree founded on an agreement binds
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those only who were parties to the agreement. 2 Scho. & Lef., 220; 3 Mon., 296; 25 Ind., 458; 7 Cold., 191.

Even a guardian *ad litem* cannot by any prejudicial act bind an infant. 54 Ill., 231.

In Doyle vs. Blake, where executors, after intermeddling with the estate, entered into an agreement to renounce in favor of another party to the agreement, who was afterwards, upon their renunciation, appointed administrator *cum testamento annexo*, and became insolvent, Lord Redesdale held that legatees who were not parties to the agreement were not bound by the renunciation or the appointment of the administrator, and that the executors were responsible for the assets which the administrator had wasted. His Lordship said: "Now, if this agreement had been intended to bind the rights of the legatees, they ought to have been parties to it."

That the understanding in Doyle vs. Blake was evidenced by deed, and here by the admission of the party, makes no difference. The agreement was the principal thing; the deed was in that case only evidence, and the admission is evidence in this case.

But, besides the admission, the facts of the case raise a strong presumption of such understanding and agreement. On the 1st of November, 1855, appellant received the personal estate from Bronnum; on the 27th December, 1855, he converted the realty into money; on or about the 1st January 1856, he resigned the guardianship; about the same time Bronnum was appointed guardian; and thereupon appellant returned to Bronnum not only what he had received from him on 1st November, but also the proceeds of the realty which he had converted into money on the 27th of December.

Sixth. The understanding between appellant and Bronnum, coupled with the orders of the Probate Judge, and the acts of the parties under and in connection with them made Bronnum appellant's agent.

Such was the relation that Lord Redesdale established between the executors and Horan in *Doyle vs. Blake*; and he did so on facts which have their duplicates in this record.

The executors had intermeddled with the assets, and thereby fastened on themselves the trust, although they had not formally accepted it. Appellant not only formally accepted the office of guardian, but also took possession of the whole estate and converted the realty into money.

The executors had an agreement with Horan that they were to renounce, and he was to be appointed administrator. Appellant had an understanding with Bronnum that the one was to resign and the other was to procure the appointment of guardian.

The executors did renounce, and Horan was duly appointed administrator *cum test. an.* by the prerogative court. Appellant resigned and Bronnum was appointed guardian by the Probate Judge.

The executors put Horan in the possession of the estate. Appellant put Bronnum in possession not only of the original estate, but also of the proceeds of the realty.

Lord Redesdale said: "When one looks at all the circumstances of this case it is impossible to say that Horan was a man in whom great confidence ought to have been placed." Judging by the eventual conduct of Bronnum, might not the same be said of him?

The executors urged the confidence the testator had in Horan, manifested by appointing him a trustee. Appellant had no such indication of confidence on the part of the father of the appellees in Bronnum to plead for his own confidence, if any he had.

The executors pressed the consideration that they had intermeddled with the estate so far only as in their judgment was necessary to protect that part of the testator's family "which appeared to be most unprotected." In this case no one's interests except appellant's and Bronnum's seems to have been considered.

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Horan wasted the estate and became insolvent, and so did Bronnum.

The legatees would have lost their legacies had they been confined to their remedy against Horan; and so will the appellees lose their estate if it must be recovered, if at all, from Bronnum.

This case involves a breach of trust, and therefore it falls within the original equity jurisdiction bestowed on the Circuit Court by the Constitutions of 1845-'68.

A Court of Chancery will interfere for the protection of the rights of infants against the acts of their guardians as trustees. 1 P. Wm., 710; 2 Kent, 227; 2 Story's Eq. Jr., § 1,339, note 1; 1 John. Ch. R., 99.

Could a clearer case than this be presented for the interference of a Court of Equity? The estate of three infants is illegally placed by their guardian in the hands of a man who wastes it; they are in consequence compelled to rely on their own labor for support at the age of sixteen; they are kept in ignorance of their rights until after one is married and the others are on the verge of manhood; they learn their rights at last, not from their guardian, but from mouldy records that had been buried for four long years; when they call on their guardian for an account of his long-concealed trust, he bids them to seek redress against the faithless bankrupt in whose hands he had placed their estate; when the law calls the guardian to account, he does not deign to explain any one of the remarkable facts that require explanation, the receipt by the guardian of the personal estate from Bronnum, and its return to him in sixty days, the conversion of the real estate into money by the guardian at a time when he must have already formed the design of resigning his trust, the payment over of the purchase money to Bronnum only a few days after it was received by the guardian, the ignorance in which the guardian permitted the wards to remain of their rights. But admitting all the facts, with all the inferences fairly deducible from them, with all the

suspicious they may excite, he relies exclusively for his defence on the *ex parte* orders obtained from the Probate Judge, when the infants were in their swaddlings, one by himself and the other by his agent, with his concurrence.

As Lord Eldon said in *Conyngham vs. Conyngham*, 1 Ves., 322, "A court of justice must wink extremely hard not to see the plaintiff's clear right."

To the objection made by the amended demurrer, that Bronnum is not a party to the action, the answer is obvious. If it be true, that the orders of the county court discharging appellant and appointing Bronnum were void, it follows logically that appellant's guardianship has been uninterrupted; that Bronnum has never stood in the relation of guardian to the appellees; that appellants must account with them for what he received as their guardian, and that Bronnum is accountable to appellant; but appellant cannot require the appellees to make this action a means of enforcing his rights against Bronnum.

Again; although the complaint shows that Bronnum is a non-resident, it fails to state any of the other circumstances required to bring the case within some one of the five classes of cases in which a party can be made by publication. Secs. 2 and 3, Act of January 27, 1871, p. 10.

The right of the appellees to compound interest is settled by *Young vs. Kinnie*, 5 Fla., 542.

WESTCOTT, J., delivered the opinion of the court.

It is insisted that the Circuit Court has not jurisdiction of this cause; that jurisdiction has attached in the county court, and that if any case is made, that is the proper forum to grant relief.

This complaint was filed under the Code, and the law of the Code must be the rule of decision to be applied to it. Under the Code a complaint is the means through which both the common law and chancery powers of the Circuit Court may be invoked, and the Circuit Court is a court

having general original jurisdiction in both common law and equity causes.

In this case Simpson, as guardian of these infants, had in his control nine thousand four hundred and seventy-four dollars. Pursuant to an understanding between Bronnum and himself, he applied for and obtained an order discharging him from his guardianship, and Bronnum applied for and obtained an order appointing him guardian, and thereupon Simpson turned over to him the amount above named. Bronnum subsequently wasted the estate. Plaintiffs now seek to recover this sum of Simpson, upon the ground that these proceedings of the probate court are void; that it was not in the power of the probate court to discharge Simpson; and that if it was within its power to discharge him as guardian, its action was void as to them, they having been given no notice of the application for discharge. It is thus seen that the general question arising upon this demurrer is whether Simpson was, either in law or equity, liable for this sum; and if he was so liable, plaintiffs sought a judgment for that sum.

Is the jurisdiction of the county court adequate to the granting of such a judgment and its enforcement? The county court has no such power. Its jurisdiction, in strictly common law cases, is limited to "cases where the amount in controversy does not exceed three hundred dollars." It cannot hear and determine a suit arising out of the relation of guardian and ward, and enter a judgment or decree for the sum claimed in this action. The county court has full power to call a guardian to an account, and to exercise other powers, either surrogate or probate in their character, appertaining to the infant and his person and estate. These powers, however, do not extend to jurisdiction in an action upon a guardian's bond for a sum over three hundred dollars; nor would it have jurisdiction to enter a decree for the sum claimed in this suit.

The case presented is nothing more than a matter of ac-

counting between guardian and ward, in which the sum claimed is in excess of the ordinary civil jurisdiction of the county court, and to the recovery of which the jurisdiction of a court of equity or common law is appropriate, according to the peculiar nature of the facts, that is, whether they are legal or equitable, which constitute the basis of the claim. The Circuit Court had jurisdiction over the subject matter of this action.

The second error assigned is that the judge could not enter this order in vacation. This being one of those cases in which, prior to the Code, the Judge of the Circuit Court could have acted in vacation, he is, by the amendments of the Code, now authorized to act out of term. There is an apparent conflict between the provisions of Section 201 of the Code and Section 202, as amended, (Chap. 1,832, Sec. 7,) but this was the evident intention of the Legislature, and if any effect is given to the amendment, it must go to this extent, or have no operation at law to accomplish the effect desired by the Legislature.

Thus disposing of these preliminary questions which relate to general jurisdiction over the subject of the action, and the regularity of its exercise as to method, we reach the merits of this controversy.

Their consideration is involved in the determination of the third error assigned, which is that the judgment upon the demurrer should have been for the defendant, for the reason that the complaint does not set forth facts sufficient to constitute a cause of action.

Appellant insists, that after the appointment of Bronnum as guardian, his receipt was a discharge of Simpson's liability, while appellees maintain that the Judge of Probate could not, under the Constitution then in force, make the order removing Simpson from the guardianship; that the constitutional direction to the Legislature conferred no power upon the Legislature to vest such jurisdiction in the Judge of Probate; that no such jurisdiction was conferred by the

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Legislature; that if it was, such jurisdiction was in this case exercised without notice to these infants, and is for that reason void as to them, and that the facts attending the attempted removal of the one and appointment of the other are such as render Simpson still liable for these funds.


These proceedings in the probate court were had under the Constitution of 1839, and the legislation thereunder and it is to these we must look to determine their validity. The argument is, that the power to remove a guardian was under this Constitution an exclusive power of the court of chancery; that such was the case in England, and that such was the case here.

Under this Constitution it was provided that "the judicial power of this State, both as to matters of law and equity shall be vested in a Supreme Court, Courts of Chancery Circuit Courts, and Justices of the Peace," and until a separate court of chancery was organized, the Judges of the Circuit Courts were to exercise such chancery jurisdiction. Following the general distribution of judicial power, Section 9 of the same article directed that "the General Assembly shall provide by law for the appointment in each county of an officer to take probate of wills, to grant letters testamentary, of administration and guardianship, to attend to the settlement of estates of decedents and of minors, and to discharge the duties usually appertaining to courts of ordinary subject to the direction and supervision of the courts of chancery as may be provided by law." These clauses must be construed together, with reference to the manifest purpose of the Legislature, and that purpose must be determined by the nature of the changes which they worked in the antecedent system, and the objects which they intended to accomplish. We cannot accept the argument that because the power to remove was an exclusive chancery power in England, that such was the case here under the American system, a system in which many of the powers belonging exclusively to courts of chancery in England are here confi-

ded to other courts. The constitution in express terms directs that this officer shall have jurisdiction in the matter of appointing guardians and the settlement of the estates of minors. Under the English system, the settlement of the estate, as far as its management was concerned, and the appointment of a general guardian, were exclusive chancery powers, and even there the chancellor does not attempt to deal with the inheritance of infants without the aid of an act of parliament. 1 Malloy, 525; 6 Beav., 97. There was in England no such thing as a distinct surrogate's court or court of ordinary, or of probate, and what were called county courts, while their jurisdiction, before the courts at Westminster were erected, was very extensive, yet they have had no such powers since that time, if they did before; and while the ecclesiastical courts have since that time exercised some of the powers which in this country belong to the jurisdiction of what in American law are called courts of ordinary, surrogate's courts, or probate courts, such as taking proof of wills, granting letters testamentary and of administration, &c., still they had not in the matter of guardianship any power beyond the appointment of a guardian *ad litem*, a power incident to any jurisdiction where an infant's interest can become the subject of judicial investigation. The books disclose but one case in which such power was exercised by them. In that case, Lord Hardwicke reprobated it as a presumption in the ecclesiastical court to appoint a guardian of the person and estate, declared their appointment of such guardian to be an interference with his power as chancellor, and recommended the Attorney-General to resort to a *quo warranto* to try the question. We thus see that the power to appoint a general guardian of the person and estate belonged exclusively to the chancellor in England. The power *to settle the estates of minors* was equally a chancery power, and it must be noted that this is a greater power than the power *to settle the account of a guardian*, from which appellees insist no power to remove him can be implied, but of

this we say more hereafter. We thus see that every power directed to be granted by the Constitution as to the matter of guardianship, was an exclusive chancery power in England, and that there was no court in the English system corresponding in its functions and relative powers to the courts of ordinary or of probate in the United States.

What powers followed the grant embraced in the words, "and to discharge the duties usually appertaining to courts of ordinary," so far as concerned the matter of guardianship? These powers, it is evident, must be ascertained by reference to the powers of such courts in the United States, as there was no such court as a *court of ordinary* known to the English system. The term, ordinary, there signified every official of the bishop or other ecclesiastical judge having official power, and at common law it signified him who hath ordinary or immediate jurisdiction in causes ecclesiastical. There are comparatively but few courts known as courts of ordinary in the United States. We have examined the laws of all the States within our reach. We find but one State in which there is a "court of ordinary." We find ten in which there are "courts of probate," two in which there are "orphans' courts," three in which there are "county courts," one in which there is a court of "common pleas." The term, "courts of ordinary," in the Constitution, cannot be interpreted with reference exclusively to courts of that particular name. If, however, such was the case, the power to remove a guardian, to revoke his appointment, is possessed by that court. These words indicate "a class of duties which the Constitution provided should be imposed by the Legislature on the officer designated, these duties to be of a like character with those imposed by other States" upon the courts which, in their several systems, had the power of appointing guardians and the general supervision of their accounts. This officer was not only to be invested with the general and particular powers named in the Constitution, but the Legislature was to impose such duties as usually ap-



pertained to those courts in other States which occupied in their system the same relative position which the probate court was to have in ours. And, in the matter of guardianship, it made no difference whether these powers were such as belonged exclusively to the court of chancery in England. All general power over the guardian in England being of that character, such a construction would deny a chancery power, notwithstanding it was a power usually appertaining to courts of ordinary and would exclude every other power, except that of appointment and settlement of accounts. This is not a proper construction, as the Constitution expressly directed that the Legislature should impose the duties usually performed by such courts without any such exception. These differences, in the American and English systems, are fundamental in their character, and the clear inference is, that those who made them intended great changes. These changes, too, are not restricted alone to the matter of jurisdiction, but extend also to the method of its exercise. Under the English system, the chancellor had a general discretion and control, and the guardian was not bound by any statute or act of parliament to render his accounts at stated periods, while here, fixed periods were indicated for his accounting. Again, all the powers which the Legislature was to confer were to be powers, in the exercise of which this officer was to be subject to the direction and supervision of the court of chancery, and a court of chancery could not perform a more appropriate function than supervise an inferior officer invested with powers of a like description as those possessed by itself; while it would be an inappropriate function to supervise the exercise of powers of a different character. It would be an anomaly for a court of chancery to supervise or direct a court exercising common law powers. Indeed, if such authority was given to it, it would cease to be a court confined to chancery jurisdiction, and become court exercising powers of each character, and thus strictly both a court of chancery and common law. The fact that the re-

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removal from the place of guardian was in England a power confided alone to the chancellor, is not a reason why such a power might not, in perfect accordance with the Constitution, be invested by the Legislature in this officer. The verse, we think, is the proper view. The framers of this Constitution expected, directed and intended that the Legislature should by law give this officer *just such powers*, to be exercised under the general control of the chancellor. This officer was to be an aid and auxiliary to that court, and, in the matter of guardianship, was to be invested with such power as would enable him to control the guardian and protect the estate.

Is the power to remove or displace a guardian of like character with the powers conferred by other States on their courts of ordinary, or is it a particular power following the grant of authority to settle the estate of the infant? We have exhausted the material for examination at our command, and without a single exception these courts have the power to remove or displace a guardian from his office or place before its termination, according to the letter of his appointment. In many of the States, they have control over them similar to that exercised by the court of chancery in England, and sometimes the jurisdiction is exclusive. Cooley's Black., § 463, note 10. (1.)

(1) *Maine*—The Judge of Probate may "dismiss" at his discretion or upon request of guardian.

New Hampshire—The Judge of Probate "removes" whenever he thinks it necessary or expedient.

Connecticut—The J. P. appoints and may remove for good and sufficient cause.

Rhode Island—The J. P. appoints and has general power of removal.

Vermont—The J. P. has general power to remove and may accept resignation.

New Jersey—General power of removal belonged to Orphans' Court.

Maryland—Particular power of removal belonged to Orphans' Court.

Georgia—Courts of Ordinary appointed and might dismiss.

Indiana—Court of Common Pleas appointed and had particular powers of removal.

While the causes for which this revocation of appointment and displacement from his position are various, in some States the power being general, in others limited to particular circumstances, still the power belongs to the class which usually appertains to courts of ordinary in the United States, and for this reason we conclude that the Constitution does justify the investiture of such authority by the Legislature. We deem it unnecessary to say anything as to the power to settle the estates of infants, in view of this conclusion, as it disposes of the point.

We next inquire, has this power of revocation of appointment and displacement been conferred by the Legislature?

In accordance with the direction of the Constitution, the Legislature, at its first session, passed "an act to organize the courts of probate for the State of Florida." After fixing the method of appointment and the term of office of the officer, it was enacted that it should be his "duty to take probate of wills, to grant letters testamentary, of administration and guardianship, to attend to the settlement of estates of deceased persons, and of minors, and to discharge the duties usually pertaining to courts of ordinary; and an appeal shall lie from any final order or decision of the said Judge of Probate to the Circuit Court of the proper county in like manner as the same is now authorized from the decisions of the County Courts to the Superior Courts."

Tennessee—County Court might appoint and might remove in some cases. Guardian might resign.

Kentucky—County Court might appoint and remove. Guardian might resign.

Alabama—J. P. might appoint; might remove for cause.

Mississippi—J. P. might appoint and "displace."

Arkansas—J. P. appointed and might remove for good cause.

Iowa—County Court appointed and might remove for cause.

Michigan—J. P. appointed; could remove for cause. Guardian might resign.

Minnesota—J. P. appointed; could remove for cause. Guardian might resign.

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The act further provided "that the Judges of Probate hereby authorized to be appointed, shall have all the powers and shall perform all the duties heretofore prescribed by law as the powers and duties of Judges of the County Courts, when acting as courts of ordinary."

It further provided "that every Judge of Probate shall record in a book or books, to be kept for that purpose, distinct and at full length all wills, testaments and codicils proved before him, and the proof thereof, all letters testamentary and of administration, all accounts of executors and administrators settled before him, all orders and decrees made by him in relation to such estates, the appointment of guardians and the revocation of such appointment, the accounts rendered by guardians and settled by him, orders and decrees for the sale of minors' real estate, all orders and decrees for the assignment or admeasurement of dower, and all other orders and decrees."

Under the legislation conferring powers upon the county courts, it was provided that "the county courts shall hear and determine all complaints of wards against guardians, require of them counter security, when necessary, displace them, or make such orders as to them may seem equitable and right relating to the estate." Sec. 1 of Act Nov. 20, 1828, Duval, 168.

The 8th section of an act approved February 17, 1833, Duval, 276, provided "that the Judge of each County Court shall have power either in open court or in vacation to take the probate of wills, grant and revoke letters testamentary and letters of administration, appoint and displace guardians of infants, orphans, idiots, lunatics and persons *non compos mentis*." * * * *

Section 50 of the act of November 20, 1828, enacted, provides "that the Judges of the several County Courts of this territory shall have power to take cognizance of all matters concerning orphans and their estates, and to appoint guardians in cases where it appears necessary and proper, and

shall take good security of all guardians appointed by them for the estate of orphans committed to them." * *

Under these statutes the Judge of Probate was invested with a very extensive jurisdiction. We have already seen that the power to remove or displace a guardian is such a power as usually appertains to courts of ordinary in the sense that these words are used in the Constitution, and the same is true of the power conferred by these words in the act of the Legislature organizing the probate court. Under the first section of the act of November 20, 1828, it is made his duty to hear and determine all complaints of wards. He is invested with the general power to require of them counter security whenever he deems it necessary, and he has the general power to displace them, as well as to make such orders relating to the estate as to him may seem equitable and just. It was insisted in the argument that the effect of this section was to restrict this power of displacement to those cases only in which the ward complains of the guardian. It was not the purpose of the Legislature thus to restrict the court. Such a restriction would be inconsistent with the general tenor of the whole of this legislation. The infant is, by law, deemed incapable of attending to his own concerns, and it would be strange indeed if the power of the court, which has charge of his interests, could be invoked in this important matter only when one legally deemed incapable of attending to his own concerns should call for the exercise of such protection. The guardian of an infant occupies a position of power and control, both as to his person and estate, and it is against this power and influence that the infant needs protection. Strange indeed would be that law which, while it deemed one incapable of protecting himself and placed him in the control of another, still restricted the power of a court to which his general interest was confided, in extending this protection against such power to those cases only in which this incompetent person should act. The proper grammatical construction of this section vests a gene-

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ral power to displace, and such power is entirely consistent with the general policy of the legislation upon the subject. Section 50 of the same act invests the Judge of Probate with power to take cognizance of all matters concerning orphans and their estates, and to appoint guardians. The 8th section of the act of February 17, 1833, invests him, in general terms, without any restriction, with the power to appoint and displace guardians of infants. The Legislature, deeming it essential that this officer should preserve a record of his acts under these powers, required of him to make a record of all appointments of guardians, and the revocation of such appointments, thus showing that the Legislature conceived that he had the power, under this legislation, to revoke such appointment. It should be a plain case to justify us in giving a construction to a statute inconsistent with the clear legislative interpretation of its own action.

A brief examination of the cases cited from New York will show the very great difference between those cases and this. Under the Constitution of New York, no power was conferred upon a surrogate. The Legislature was not directed to invest any officer with powers of the nature mentioned in the Constitution of Florida, and the chancery jurisdiction was invested in other courts under the letter of the organic law. Under the legislation of that State, there was no general grant of power, from which this power to revoke an appointment of guardian could be implied or result. His jurisdiction to remove was restricted by the Legislature in this language: "On the application of any ward, or of any relation in his behalf, or of the surety of a guardian, to the surrogate who appointed any guardian, complaining of the incompetency of such guardian, or of his wasting the real or personal estate of his ward, or of any misconduct in relation to his duties as guardian, the surrogate, upon being satisfied by proof of the probable truth of such complaint, shall issue a citation to such guardian." The act further provides that if, upon the trial, he is satisfied of the incompetency or mis-

conduct of such guardian, he may, by an order, remove the guardian from his trust, and, upon such removal being made, the surrogate may proceed and appoint a new guardian. Chancellor Kent held that under this statute the surrogate had no general jurisdiction over a guardian appointed by him as trustee, that power remaining in the court of chancery. (1 John., 99.) So Chancellor Walworth held, (5 Paige, 536,) that this statute gave jurisdiction to a surrogate to remove a guardian appointed by him, (the surrogate,) for incompetency or misconduct, but he had no jurisdiction to remove a guardian appointed by the court of chancery, or to compel him to account either before or after such removal.

This was the point involved. In his opinion, however, the chancellor went further and remarked: "The surrogate has no authority to call any guardian to account, or to discharge or remove a guardian, except in the particular cases specified in the statute, the surrogate, in this respect, taking no incidental power or constructive authority by implication which is not expressly given by statute." Looking to the New York statute, it is apparent that no other conclusion could have been reached. Looking to the Constitution and statutes of New York and Florida, it is equally apparent that the powers conferred upon the surrogate in the one State and the Judge of Probate in the other, are not at all similar, and that the cases in New York are not authorities by which to measure the power of the Judge of Probate in Florida.

The probate court having the power to revoke the appointment of Simpson, and thus displace him from the place of guardian, the next question presented for our consideration is, was it necessary to the validity of this order that the wards should have been given notice? It is insisted that they were entitled to notice upon the broad ground that such an order was one affecting their rights.

It is unquestionably true, as a general proposition, that no person can be deprived of his life, liberty, or property, S.C.R.15—4

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without due process of law, and also that this involves notice. It is, however, clearly settled that no ward has a right to a particular guardian, and that guardianship is an office or place under the sole and exclusive charge of the courts having jurisdiction over the general subject of the custody of infants. The chancellor or court having general power or revocation, is entrusted with the management of the estate, subject to such regulations as are prescribed by law. In England the jurisdiction, so far as the appointment was concerned, was exercised in a summary manner upon petition, and there are cases in the United States holding expressly that it is no objection to the validity of an appointment that the infant was not made a party. (33 Ala. 221; 1 Ala. 388; 2 Doug. 434; 1 Hay. 303; 39 Ala. 150; 7 M. and W. 409; 7 Ves., Jr., 348, 381.) The matter of the appointment of a guardian certainly affects the interest of the infant as much as the removal. The case from 1 John. Ch'y, cited by appellee, sustains this view as to the power of removal. There the ward had arrived at the age of fourteen, and sought to remove the guardian. Chancellor Kent said: "This court has the care and protection of infants during their minority, and they have not, nor ought to have, any such power in regard to guardians appointed by this court." See also 1 Murphy, 227. It is the practice in many of the States for this action to be taken at the instance of some relative of the infant. Baron Alderson, in the case above cited, says, that "in all cases where a party cannot sue for himself, the court employs a *prochein ami* as its officer to conduct the suit for him, and no appointment or subsequent confirmation by the party is necessary. It is in fact almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act in behalf of the infant." As a matter of course, there is, in many respects, a difference between the powers and duties of a *prochein ami* and that of a general guardian, and the case is not precisely this case. The general guardian, as well as

the *prochein ami*, are, however, both officers of the court, and the infant has, as against the power and discretion of the chancellor, no more power in the one case than in the other. In the case of Ripton vs. Hall, 1 Stewart, 166, the complaint was filed by a person other than the infant, and the guardian was removed. The court remark, "as the statute prescribes no particular mode of proceeding, (and that is the case in Florida,) nothing more is necessary to appear of record than that the court had jurisdiction of the subject matter of the controversy, that the guardian had an opportunity of being heard, and has been removed for good and sufficient cause." The power of removal there was limited to cases where good and sufficient cause was shown, and this case was heard upon appeal. It is insisted also that the exercise of the power of removal or displacement here was not in conformity with the rule prevailing in a court of chancery, that the guardian was removed without cause, and as it were upon his mere resignation. We do not say that there was any error here, but if there was, the Judge of Probate, having this power and jurisdiction of the subject matter, an erroneous exercise of it cannot be reviewed and corrected in this collateral manner. The case of Young *et al.* vs. Lorrain *et al.*, 11 Ill., 633, is a case precisely in point. This principle is so well recognized that it is unnecessary to say more in reference to it.

There remains but one more point to be disposed of in this case, and that is whether, under the facts set up in the complaint, the transfer of the moneys by Simpson to Bronnum relieved Simpson from any further liability.

The plaintiffs in their complaint allege that on or about the first day of January, 1856, pursuant to an understanding between the defendant and the said Bronnum, the defendant applied for and obtained an order from the probate court of said county discharging him from his said guardianship, and the said Bronnum applied for and obtained an order appointing him guardian of the persons and the estates

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of the said Emelia J., Eric and Richard C., and thereupon the defendant turned over to the said Bronnum all the assets in his possession, or under his control, belonging to his said wards, including the proceeds of their real estate, which the defendant had converted into money as aforesaid, amounting in the aggregate to \$9,424.87. The plaintiffs further allege that the said Bronnum has utterly wasted and spent the entire estate, and that the sureties upon his bond, as well as himself, are insolvent.

There is no allegation that Simpson, the removed guardian, was in any way connected with the subsequent wasting of the estate by Bronnum. There is no allegation that Simpson had any reason to believe even that Bronnum was not entirely trustworthy at the time of the change. As to the naked understanding and agreement between these parties, in the absence of an allegation of facts showing it to have been fraudulent, we cannot presume that such was the case, and therefore no case of fraud is here presented for our consideration. If there was nothing more than understanding, we cannot see the least impropriety in that. We think rather it is highly commendable in a guardian to continue in the discharge of his trust until he can find some suitable person to whom it can be transferred. Such would be the course of any guardian who felt much interest in his ward, in the future of the infants entrusted to his care. The court itself might refuse a revocation of appointment until the name of some good person was suggested. Upon the revocation of the appointment of Simpson, his power as guardian for the future ceased. It was a matter of course to require him to account and to pay over to his successor the balance. (10 Paige, 316.) Having done this, he was relieved from any further responsibility. There is a great difference between this case and the case of *Doyle vs. Blake*, so much relied upon by the appellee. The executors there had acted; had each intermeddled with the assets. The administration to Horan was void. (Levinz, 182.) Their transfer-

ring the assets to him was the same as if they had transferred them to an individual. In the present case Simpson was displaced from his guardianship by a court having that power. The simple revocation of his appointment, his removal, did not release him from any liability for past acts. When he ceased to be guardian, he was no longer entitled to the custody of the assets. The court then appointed Bronnum. That appointment was not void like Horan's, but was effective and legal. He became legally entitled to the custody and control of the estate of the ward, and his reception of the funds relieved Simpson of all liability for the loss which occurred by the subsequent wasting of the estate by Bronnum, and the insolvency of Bronnum and his sureties.

The judgment is reversed, and the case will be remanded for further proceedings not inconsistent with this opinion, and conformable to law.

DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, 1875.

WILLIAM A. ROSS, APPELLANT, VS. THE STATE OF FLORIDA,
APPELLEE.

An indictment charging one with having, without lawful authority, forcibly imprisoned another against his will, does not state an offense under Section 43 of Chapter III. of "An Act to provide for the punishment of crime and proceedings in criminal cases," approved August 6, 1868. Under that law the acts charged must have been committed "with intent to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State," &c. The Act of 1832, punishing false imprisonment by fine or imprisonment, stands unrepealed.

Writ of error from Fifth Circuit—Marion county.

The grounds of appeal are set forth in the following assignment of errors:

1. The court erred in refusing to quash the indictment.
2. The court erred in refusing to charge the jury that before they could find the prisoner guilty, they must find from the evidence that defendant "confined, or inveigled, or kidnapped the party charged with being falsely imprisoned, either with intent to cause such party to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State against his will."
3. The court erred in refusing the motion for a new trial.
4. The court erred in refusing to grant the motion for the arrest of the judgment.

S. St. George Rogers for Appellant.

The points upon which plaintiff in error rests his case are as follows, to-wit:

1. That the court erred in refusing to quash the indictment in said cause upon the grounds and for the reasons stated in said motion, a copy of which is embraced in the record.

2. That the court erred in his charge to the jury, a copy of which appears in the record.

3. That the instructions asked for by State's Attorney and given by the court, were contrary to law.

4. That the court erred in refusing to give to the jury the instructions asked by defendant's counsel.

5. That if the prosecution was instituted under the act of 10th of February, 1832, the same was a misdemeanor and not within the jurisdiction of the Circuit Court: See Constitution.

6. That it is not lawful for the grand jury of the Circuit Court to find bills for misdemeanors. See act February 19 1874; act August 6, 1868.

7. That the court erred in refusing a new trial upon the grounds stated in the motion.

Wm. Archer Cocke, (Attorney-General,) for Appellee.

The indictment in this case is in accordance with the statute.

What does the statute set forth under the act of 1868, § 43, p. 68? *Vide* statute. What does the indictment set forth? *Vide* indictment.

Now examine the bill of exceptions, and it is only from it that this court can take cognizance of points of law that were raised in the court below. None can be presented here that are not in the bill of exceptions. *Vide* *Frisbee and Johnson vs. Timanus*, 12 Fla., 537. What are they?

1. That the verdict of the jury was contrary to the evi

dence. This point cannot be sustained, because the bill of exceptions does not show what the testimony was.

2. That the verdict of the jury was contrary to law.

Examine the points of law made by the bill of exceptions:

1. That the indictment was for an offense committed under the act of February 12, 1833. *Vide* act. The offense under it was a misdemeanor. Every point in this article of the bill of exceptions is defective for this reason. The indictment is not under the act of 1833, but under the act of 1868, § 43, p. 68. In the said 43d section of this act there is a phraseology which connects different forms of the same crime in the same sentence, which is employed in the alternative. Thus, *imprisons* or *secretly confines*, &c.

2. The third point in the bill of exceptions sets forth that if the indictment was under the act of 1868 it was defective in this, that it did not set forth the full offense. This point in the bill of exceptions is not well taken, for it does not specify wherein the indictment fails to set forth the whole offense; but the indictment does set forth an offense sufficient to charge the criminal with a violation of the law.

3. That if the indictment was found under the act of 1868, it is insufficient. That it does not set forth the entire list of offences under the statute is no ground of exception to the indictment. It must say in terms what the defect is. As to the general scope and extent of an indictment under a statutory offence, *vide* State vs. Pearce, 15 Fla., 153.

4. That the court erred in the charge it gave to the jury. Examine the first charge by the court. It is legal, because in accordance with the statute. *Vide* act of 1868, sec. 43, p. 48.

5, 6 and 7. That the court erred in the charges it gave to the jury. Examine these charges *seriatim*. They are in accordance with the statute under which the defendant was tried and convicted. What is necessary to be charged in an indictment? *Vide* Wharton's Cr. Pr., vol. 1, p. 292, 7th ed.

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The intent is inferred from the act committed. "When a statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment is necessary." Wharton's Cr. Pr., sec. 297, 7th ed.

Reference has been made in the bill of exceptions to the act of 1874, chap. 2009, (No. 34,) prohibiting grand juries from indicting persons for misdemeanors, &c. This statute would be a bar to this case if the defendant had been indicted under the act of 1833, which makes false imprisonment a misdemeanor, but the statute of 1868 makes it felony, and the act of 1874 has no connection with this case, the accused being indicted under the act of 1868.

As to the effect of the act on the offence of false imprisonment passed in 1833, *vide* act of 1868, sec. 30, p. III.

RANDALL, C. J., delivered the opinion of the court. "

Plaintiff in error was indicted for having, "without lawful authority, forcibly imprisoned one Thomas P. Gary against his will, and without any legal warrant, authority or reasonable or justifiable cause whatever, imprisoned and detained him so imprisoned for the space of five minutes."

Upon the trial the jury rendered a verdict of guilty, and the said William A. Ross was sentenced to imprisonment in the State prison for one year.

Before trial the prisoner's counsel moved to quash the indictment on the ground that the offence stated in the indictment was a misdemeanor only under the act of Feb'y 10, 1832, (Th. Dig., 490,) of which offence the Circuit Court had no jurisdiction, and that by law (act of Feb'y 19, 1874,) an indictment for a misdemeanor was a nullity, and that the indictment did not state an offence under the criminal law of 1868, (act of Aug. 6, 1868, p. 68.)

After verdict, prisoner's counsel moved in arrest of judgment upon the same grounds. The court refused to grant either motion, and this is assigned as error.

The act of August 6, 1868, provides that "whoever, with-

out lawful authority, forcibly or secretly confines or imprisons another person, within this State, against his will, and confines, or inveigles, or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State against his will, * * * shall be punished by imprisonment in the State Penitentiary not exceeding two years."

The plaintiff in error contends that under this act the unlawful imprisonment must be charged to have been committed *with intent* to cause the person imprisoned to be secretly confined or imprisoned in this State against his will, or to be sent out of the State against his will, and that an offence under this act is not well charged without alleging this intent. The counsel for the State insists that the statute of 1868 provides for punishing the offence of an unlawful imprisonment as a distinct offence; and that an imprisonment or confinement with intent, &c., is another distinct offence, and that the copulative word "and," after the words "against his will," where it first occurs, may be construed as referring to another offence defined in the words which follow it.

The statute of Massachusetts, (from which our law was copied,) has the disjunctive "or" instead of "and," and yet the courts of that State understood the whole of the preceding words as referring to the intent to kidnap. (Com. vs. Blodgett and another, 12 Metcalf, 56.) The Legislature of this State, by the use of the word "and" instead of "or," has indicated beyond question that the same construction should be placed upon it; and by leaving the law of 1832 unrepealed, (which punishes the crime of false imprisonment as a misdemeanor only,) it is clear that it was not intended to punish every unlawful confinement or restraint of another as a felony.

The judgment of the Circuit Court must therefore be reversed and the indictment quashed.

Billings v. McDermott.

LIBERTY BILLINGS, APPELLANT, VS. JOHN McDERMOTT,
RESPONDENT.

The certificate of the sale of lands by the United States Direct Tax Commissioners (under the act of Congress of June 7, 1862, for the non-payment of taxes, is *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser, and a mere assignment by the purchaser of the certificate of sale does not divest him of the title thus acquired, and the assignee of the certificate cannot maintain ejectment in his own name. The title being vested in the purchaser by the tax sale, he can only divest himself of it, under the laws of this State, by deed or by will, (if the property is not redeemed by the owner as prescribed by law,) or, the assignee of the certificate may, by complying with the terms of the second section of the act of Congress of March 3, 1865, (13 Statutes at Large, 501,) obtain a patent from the President of the United States.

Appeal from Circuit Court of Nassau county, Fourth Judicial Circuit.

A statement of the case is contained in the opinion of the Court.

Liberty Billings for Appellant.

The certificate of sale by force of the statute amounts to *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser. 12 Stat. at L., 422. So ruled in *Cooley vs. Conner*, 12 Wallace, 398.

A certificate of redemption is no evidence of title. It only proves payment of the redemption money. *Blackwell on Tax Titles*, 3d ed., 424-5.

The law provides (section 7) that the certificate of sale "shall only be affected as evidence of the regularity and validity of the sale by showing that the tax had been paid previous to the sale; that the property was not subject to taxation, or that it had been redeemed according to the provisions of this act." Legal redemption must therefore be proved.

The law does not provide for settling questions of title before the redeeming officer. *Blackwell*, 422.

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The act of redeeming is not judicial in its nature, the officer who executes the certificate acting only in a ministerial capacity, and his decisions are not conclusive upon the purchaser. *Ibid.*, 422, 432.

Respondent must show a *right* to redeem.

Ownership or interest in premises must be proved. No evidence of a "valid lien or interest" in premises entitles to redemption. Records show no "leasehold" as alleged in answer.

Must redeem in time fixed by law, or redemption void. *Ibid.*, 431. Time depends upon character of parties claiming ownership. Minors, aliens, loyal persons, &c., have two years, others one year, after sale. U. S. Direct Tax Law, sec. 7.

Friend & Hammond for Respondent.

RANDALL, C. J., delivered the opinion of the court.

The appellant brought an action of ejectment in the Circuit Court for Nassau county against McDermott to recover possession of certain lots in Fernandina on the strength of his title. Defendant denied the plaintiff's title and right of possession.

The plaintiff, to maintain his suit, introduced in evidence a certificate of the sale of the lots in question by the United States Direct Tax Commissioners for Florida on the second day of January, 1865, signed by the three commissioners, showing that Elsie Rivers was the purchaser at the sale. Appended to the certificate was an assignment of the certificate to the plaintiff, signed and acknowledged by Elsie Rivers and her husband, whereby they sold, transferred and assigned "all right, title and interest in the within tax certificate." It was also shown that defendant was in possession at the commencement of this suit and plaintiff rested.

The defendant offered in evidence a certificate of the commissioners that on the 9th November, 1865, "John Henry

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Sarah, Isabel and Mary Frances McDermott, having produced satisfactory evidence that they are minor children, and on the application of John McDermott, their father and guardian, and having taken an oath to support the Constitution of the United States, and having paid the tax charged on said land, together with the penalty, interest and costs of proceedings, * * * has redeemed the said tract of land from the forfeiture and sale thereof," &c. The plaintiff objected to the admission of the certificate "on the ground that it is not responsive to the answer and that it is no evidence of title." The objection was overruled, plaintiff excepted, and the evidence submitted. This was the whole of the evidence.

The jury rendered a verdict for the defendant, upon which judgment was entered against the plaintiff, and he appeals.

The errors assigned are that the court admitted the certificate of redemption without evidence of the *right* to redeem on the part of the defendant or of any party privy with him; and, 2d, because said certificate was not pleaded in the answer, nor was it responsive to any pleading in the case.

As to the first question, it is provided in the act of Congress for the collection of direct taxes in insurrectionary districts, approved June 7, 1862, that the owner of lands sold for such taxes may, if a minor, appear before the board of tax commissioners and redeem the property sold at any time within two years after the sale, upon taking an oath to support the Constitution of the United States and paying the tax and penalty with interest and expenses of the sale and subsequent proceedings. The certificate of redemption put in evidence shows that John McDermott, the father and guardian of the minor children named, appeared and took the oath and paid the amount necessary to redeem the lots in question from the sale by the commissioners. But it was not shown by the certificate of redemption, or by any evidence before the commissioners or before the court, that the

persons named were the owners of the lots or had any interest therein, and hence it did not appear before the court or jury that they had the right to redeem and prevent the purchaser from acquiring the title under the certificate.

The same statute (section 7, volume 12, U. S. Statutes at Large, p. 423,) provides that the certificate of sale shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale, and of the *title of the purchaser under the same*. (See Cooley vs. Connor, 12 Wallace, 391.)

Now the plaintiff's objection to the certificate of redemption as evidence, as it appears in the record, was not upon the ground that there was no accompanying evidence of the interest of the minors or of the defendant in the lots before the court, but as it appears that no such evidence was given, we are at liberty to determine that there was not sufficient evidence in the case to defeat the title of the purchaser at the tax sale. The act gives the right to redeem in the manner provided by it by the owner or by any loyal person having an interest in, or lien upon, the land sold.

But although the plaintiff may have been correct in regard to the regularity of the attempt to redeem, we cannot hold that he may recover upon his own evidence as disclosed by this record.

The plaintiff upon his pleadings must show title to the premises he seeks to recover in himself. He produces a tax certificate, which, under the act of Congress, is evidence of the title of the *purchaser*, and the purchaser is Elsie Rivers. Her title was derived from the sale to her by the tax commissioners, and the certificate is the only *evidence* of the sale and of her title under it. He shows no release, assignment, or conveyance by deed, or otherwise, of the property described in the certificate, but merely that the certificate has been assigned to him.

Mrs. Rivers, if the property was liable to be taxed, and was not properly redeemed from the sale, had a *prima*

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facie title. Under the statutes of this State, no estate or interest of freehold can be created in any other manner than by deed in writing by the party "creating, making, granting, conveying, transferring, or releasing such estate or interest," or by will duly executed according to law. This assignment of the *evidence* of her title carries with it no legal estate in the lands described.

The act of Congress of March 3, 1865, however, provides that the transferee of a certificate of sale, by complying with certain conditions, may receive a patent from the President of the United States, which would doubtless invest him with a title. But this not having been done, the legal title remains in the purchaser at the tax sale.

It follows that the plaintiff has shown no right to recover in this suit, and the judgment must therefore be affirmed.

ROBERT M. SMITH, RESPONDENT, VS. EDWARD B. BULKLEY,
APPELLANT.

When a defendant has appeared and pleaded to the declaration, he cannot, on appeal, take advantage of any irregularity in the service, or of the entire omission to make service of the process by which the suit is commenced.

Appeal from the Circuit Court for Duval county, Fourth Judicial Circuit.

The points in this case are fully explained in the opinion of the court.

Liberty Billings for Appellant.

This was a proceeding under the Code by attachment levied on real estate in Fernandina belonging to a non-resi-

dent, Edward B. Bulkley, of the State of New York, the appellant.

The records show no personal service nor newspaper publication, nor mailing of notice and petition as required by statute; and no evidence appears of said Bulkley's residence being unknown, or that it could not be ascertained.

Robert M. Smith for Respondent.

This was an action under the Code, tried by a jury and verdict rendered for respondent at the Spring Term, 1874, in the Fourth Judicial Circuit, Duval county. Motion was granted for new trial upon the ground that certain papers improperly went before the jury.

A new trial was had at the same term, and verdict was rendered by a jury for respondent in the sum of \$684, and \$190.03 costs.

No exceptions were taken at the time of trial, or before or after judgment. Every charge asked by appellant was granted.

First. Respondent asked that the judgment of the court below be affirmed, and in addition that ten per cent. upon the judgment be allowed as damages for delay, under section 251. Int. Div.

Second. For the reason that appellant has had two fair and impartial trials before a jury, and in each case verdict was rendered for respondent, the appellant in the course of said trials being allowed to put in every defense asked by him, and no testimony of any character or description offered by appellant was excluded.

RANDALL, C. J., delivered the opinion of the court.

This suit was commenced under the Code, by the issuing of a summons, and an attachment was also issued and levied upon defendant's property. Defendant was a non-resident. There was no personal service of process, and no publication of summons.

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The defendant, however, appeared by two attorneys, and pleaded to the complaint, and two trials were had, each of which resulted in a verdict for plaintiff, a new trial having been granted after the first verdict on the motion of defendant by his attorney.

No exceptions appear to have been taken, and the only question made upon the appeal is, that there was no service or publication of the summons, and upon this ground defendant insists that there was no jurisdiction obtained by the Circuit Court, and, therefore, the judgment should be reversed.

It has been uniformly held by this court, and by the courts of all the States and of the United States, that a general appearance of the defendant in person, or by attorney, in the suit, where no service was had, or where the service was defective, cures any defect of service, and gives jurisdiction as effectually as if service in person had been made.

The judgment is affirmed with costs, to be taxed under the Code, in favor of the plaintiff.

MILES PRICE, URIAH BOWDEN, HENRY HOWELL AND WILLIAM J. HALL, APPELLANTS, VS. SAMUEL A. WINTER, APPELLEE.

1. It is essential to the validity of the sale of the interest of an infant in the estate of his ancestor that the court making the sale should so far conform to the statute regulating the proceeding as to acquire jurisdiction of the subject matter and the parties. Over the inheritance of an infant the Legislature has plenary power. It can prescribe the method by which jurisdiction of the infant can be acquired, and conformity to this requirement is all that is necessary.
2. In proceedings for the sale of the lands of a decedent, the statute of this State does not require the service of process upon an infant heir or devisee in order to acquire jurisdiction. The statute requires the court to appoint a guardian for such of the heirs or devisees as are infants, and this is essential.

3. Where service of process is made upon the general guardian of the infant, he appears and makes the defence required by the statute and is heard by the court as the representative of the infant, such action is equivalent to his appointment as guardian *ad litem*.
4. A sale of the land of a decedent under such proceedings is a judicial sale. If the court has jurisdiction of the subject matter and the person, a purchaser at such cannot be affected by irregularities or errors in the proceedings. Such errors may be corrected upon appeal. They cannot be corrected in a collateral proceeding.
5. An executor will not be permitted to hold an interest acquired through a purchase at his own sale. If, however, a third person is interested in such bid, a court of equity should not set aside the sale as to this third person in a case where the sale was by commissioners for full value and there was no fraud in fact.
6. Where there has been a sale of an infant's interest in the estate of his ancestor, and the infant after his majority has knowingly received the amount representing his interest from the party that he is aware made the purchase and claimed title to his interest in the estate, such person so receiving such amount has no equity to recover of the purchaser any portion of the estate for which he has received an equivalent.

This action was instituted in the Circuit Court of the Fourth Judicial Circuit for the county of Duval by Samuel A. Winter, one of the devisees under the will of his father, James Winter, who died in February, A. D. 1857. The will directed a division of the land in kind among the children, share and share alike, in case a fair and equal division in kind could be made. In the year 1857, James L. Winter, the executor, filed his petition under the statute of this State in the Circuit Court for Duval County, alleging that the land so devised could not be equally, fairly and beneficially divided, and praying authorities to sell and convey the land, and to make distribution of the proceeds among the parties entitled under the will. The petition set forth the interest of the several parties, and Samuel A. Winter, the plaintiff in this action, at that time an infant, was named therein as one of the children of the testator having an

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equal interest under the will. A sale was ordered and the defendants, Miles Price, Henry Howell and William J. Hall, were purchasers at said sale.

The plaintiff in this action seeks to set aside the sale and have a partition of the land.

The Circuit Court adjudged the sale void as to the plaintiff, and entered a judgment directing a partition of the land, and the setting aside of his share to the plaintiff.

This appeal is prosecuted from that judgment. The grounds of the action of the court below and the pleadings essential to the understanding of the case as made in that court, and as reviewed by this court, and the errors here assigned, are fully stated in the opinion of the court.

J. J. Finley for Appellants.

It is contended by the appellee, who was plaintiff in the court below, that he is not bound by the said proceeding, nor the decree rendered therein, nor by the sale of the commissioners made thereunder:

1. Because the court did not appoint a guardian *ad litem* and order a citation to issue to the said guardian.
2. Because Frederick Von Santen, the guardian of the plaintiff below, was of kin to the petitioner, James L. Winter.
3. Because of fraudulent collusion between Miles Price, the appellant, and Frederick Von Santen, the guardian of the appellee.

1. It is contended by the appellee that Frederick Von Santen was his *statutory* guardian, and not his guardian *ad litem*, and that therefore the appellee was not properly before the court in the proceeding to sell the real estate for division.

The Circuit Court of Duval County, before whom said proceeding was had, was, and is a court of *general jurisdiction*, and, therefore, according to a well-known principle of law, all the presumptions are in favor of its having exercised a rightful jurisdiction, until the contrary is shown, and the

burthen of proof lay on the plaintiff below to rebut the presumption, which he did not do.

It was incumbent on him to have produced at the hearing in the court below a certified copy of the record of the proceeding for the sale of the land for division, which the certificate of the clerk under seal of the court, that said copy contained *all the record in the case*, which was not done.

Having failed to do this, the presumption arises that the court exercised a rightful jurisdiction, not only of the subject matter of the suit, but also of the person of the appellee, and it is contended that this presumption is not rebutted by any proof appearing in the record.

But even if the soundness of the foregoing proposition should be doubted, it is insisted for the appellants that the act of March 4, 1841, under which the proceeding was had, was substantially complied with.

The general principle, so well established, that "an infant is the ward of Chancery," is in substance re-affirmed in the act of March 4, 1841. Thompson's Dig., sec. 7, chap. 7, page 204.

I think the fair and reasonable interpretation of the said act is, that in the proceedings therein authorized, the court has jurisdiction of the person of the infant without bringing him before it by the service of process upon him, and simply require the appointment of a guardian to whom citation should issue, and who should appear and put in an answer for the infant, denying all the allegations in the petition, so that nothing should be taken for confessed as against the infant. And the only limitation placed on the power of the court to select and appoint such guardian is, that he shall not be the petitioner, or of kin to the petitioner, or his attorney or agent.

Now it is contended that the action of the court in ordering citation to be served on the guardian (Von Santen) was in substantial compliance with the statute, which requires the court in such case "forthwith to appoint guar-

dians of such of the devisees as are infants to answer and defend against said petition."

In this case, all the purposes and objects of the act have been fairly, faithfully and fully accomplished.

1. Frederick Von Santen was the guardian of the minor.
2. It was ordered by the court that he should be cited as guardian.
3. The citation was duly served on him.
4. He put in the answer for the ward, denying all the allegations in the petition.
5. An examiner was appointed and proof was taken on the issue made by answer.
6. Upon full consideration, it was decreed by the court that the real estate mentioned in the petition should be sold for division.
7. Commissioners were appointed to make such sale, and said sale was made under the said decree, after due notice given.
8. The sale was regularly reported by the commissioners appointed to make it.
9. And the report of the commissioners, and the sales made by them, were duly confirmed by the decree of the court.

From this, it will appear that all the requirements of the act were complied with, that the court carefully guarded the infant's interests, and that it did in this case, as it will in all cases where it may be necessary, appoint a guardian to watch and protect his rights. *Cavander vs. Smith*, 5 Clark (Iowa) 159.

If substantial justice has been done, a judgment or decree will not be set aside for mere irregularity, upon a suit instituted for that purpose thirteen or fourteen years after such judgment or decree was rendered; nor when such suit is instituted by an infant some nine or ten years after he arrives at full age.

That Frederick Von Santen, the guardian of the appellee,

was not of kin to James L. Winter, the petitioner, I cite: 1 Bouvier's Law Dictionary, 778.

Another ground urged by the plaintiff (appellee) why the decree and the sale thereunder should be set aside is that the same was fraudulent.

It is a well established principle in the jurisprudence of this State that "fraud will not be presumed, but must be proved." *Wilson & Cleland vs. Lott*, 5th Fla. R. 305; *White vs. Walker*, 5th Fla. R. 478.

In this case inadequacy of price cannot be relied on as an evidence of fraud, because the proof shows that the amount for which the land in question was sold was its full value at that time.

Besides, this was a judicial sale, and when such sale is public and fair, it may be justly presumed that the fair market value is obtained, and there seems no reason to question its general validity, but it should be specially impeached. 1 Story's Eq. Jurisp., sec. 346.

It is a significant fact that nowhere in the plaintiff's bill has it been alleged, nor has it been attempted to be proved that the price for which the land sold was less than its value, but on the contrary, it was shown that it brought its value.

In the 10th article of the complaint it is alleged "that F. Von Santen being a kinsman, relative, and of a kin to the petitioner, James L. Winter, and also one of the devisees, fraudulently combining with the said James L. Winter, without any authority of law, made acknowledgment of service of citation, and appeared and made a pretended defence to said petition in behalf of the plaintiff."

What is the proof on this point?

1. It appears from the evidence as it is found in the record, that Von Santen, without seeking it, and without even a suggestion from James L. Winter, was ordered by the court to be cited as the guardian of the plaintiff to answer the petition.

2. It was under the compulsory order of the court that he made his answer to the petition.

3. His answer denied all the allegations in the petition, and thereby put them in issue.

Thus it will be seen that there is not one particle of proof in the whole record of any combination, or even a suspicion of combination, fraudulent or otherwise, between Von Santen and James L. Winter, and it stands out upon the record a bald and naked allegation, without even the pretence of proof.

The next and only other allegation of fraud is made in the 12th clause of the complaint, wherein it is alleged that Miles Price, (one of the appellants,) through his fraudulent representations to the commissioners, induced them to execute a deed to the "Dell's Bluff tract to Uriah Bowden."

We search the record in vain to find any proof to sustain this charge.

The proof is—

1. That Price authorized Bowden to bid in the "Dell's Bluff tract for him."

This he had a right to do, and the proof shows that the sale was open and fair.

2. That Bowden bought the land for Price.

3. That Bowden thought the bid was put down to Price, but when he found the deed was made to him, he in good faith conveyed to Price.

4. That Price paid for the land.

The above is the evidence on this point; and as there is no proof whatever that Price made any fraudulent representations to the commissioners to procure them to make the deed to Bowden, the allegation in the bill is wholly unsustained.

See the answer of Emory (one of the commissioners) to the 5th interrogatory, which does not warrant even the suspicion of fraud.

It will be seen, from a complete examination of the testi-

mony in the record, that there is an *utter failure* to prove a single fraudulent act charged in the bill.

The sale was made under the decree of a court of competent and general jurisdiction; the proceedings, decree and sale were, according to the proof, entirely free from fraud; no advantage was taken of the inexperience of the minor, and there was no attempt to overreach him or to take advantage of his inconsiderateness.

But it is contended for the appellants that even if the proceedings for a sale of land for division shall be held to have been irregular, the appellee ratified and affirmed the same long after he came of age; and to this point I will now address the argument.

Assuming that the sale of the land in this case, as made by the commissioners, so far as the question of infancy is concerned, will be substantially governed by the same legal principles as if he had sold his interest during his minority, I respectfully submit the following propositions and authorities:

The tendency of the modern decisions is in favor of the policy of the rule, that the acts and contracts of infants should be deemed *voidable only*, and subject to their election when they came of age, whether to affirm or disavow them. 2 Kent Com. Marg. p. 235.

Where the contract is merely voidable, it seems, upon general principles, capable of confirmation. 1 Story's Eq. Jurisp., sec. 345 and note (2.)

If any act of confirmation be requisite after he comes of age to give binding force to a voidable act by his infancy, *slight* acts and circumstances will be a ground from which to infer the assent. 2 Kent Com. Marg. p. 237.

And so in the case of Wheaton vs. East, 5 Yerger's Rep. 41, the decision was, that a deed of confirmation of the minor's deed was not requisite; but that any act of the minor when of age, from which his assent might be inferred,

would operate as a confirmation, and would conclude him. 2 Kent Com. Marg. p. 238, note (b.)

A sale of lands received during infancy for other lands is a confirmation of the original deed of conveyance. 2 Kent Com. Marg. p. 238, note (3,) citing Williams vs. Mabee, 3 Halsted Ch. 500.

And his confirmation of the act or deed of his infancy may be justly enforced against him after he had been of age for a reasonable time, whether from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence. 2 Kent Com. Marg. p. 238.

It was the plaintiff's duty, on his discovering that the land had been sold under the decree, to have taken immediate steps, when he arrived at full age, to set aside the sale; and it is contended, that by receiving from Price the consideration for his interest in the proceeds of the sale of the lands nine years after he came of age, he ratified the sale made by the commissioners under the decree, and is forever estopped. Southern Life Ins. & Trust Co. vs. Lanier, 5 Fla. Rep. 159.

And so in the case of Curten vs. Patten, 11 Sergt. & R. 205, the court held, that some distinct act by which the infant received a benefit from the contract after he came of age would be sufficient to make a valid confirmation; and in this case it is to be observed that the contract was considered void. 2 Kent Com. Marg. pp. 238 and 239.

A person may, after full age, confirm any *erroneous judgment* rendered against him while a minor, without the appointment of a guardian *ad litem*. 3 Mass. Dig., p. 422, No. 9.

There are cases in which it has been held, that even a silent acquiescence for a considerable length of time by an infant after arriving at full age, is itself a ratification of his conveyance, and especially when he looks on and permits the purchaser to make improvements. 20 U. S. Dig., 529, citing 20 Ark. 600.

In this case the acquiescence of the plaintiff continued for a longer period than would be necessary to form a statutory bar.

The plaintiff attained his majority in 1862, and did not institute this suit until the latter part of 1871. *Voorhees vs. Voorhees*, 24 Barb. (N. Y.) p. 150.

A compromise of a suit in equity, made by a guardian, sustained by a chancellor, and approved by the Probate Court, will not be set aside upon the application of the infant after he has come of age, without good cause shown. *Dunlap vs. Petrie*, 35 Miss. 590.

If the infant, after he arrives at full age, is possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it, so that he cannot return it, or retains it for an unreasonable length of time, it will amount to an affirmation of the contract. *Manning vs. Johnson*, 26 Ala. Rep. 446; 1 Story's Equity Jurisprudence, Section 240; *Young's Adm'r. vs. McKinnie's Adm'r.* 5 Fla., p. 553.

The infant's privilege of avoiding acts which are matters of record, is much more limited in point of time than his privilege in avoiding matters *in pais*. 2 Kent marg. p. 237; *Tucker et al. vs. Moreland*, 10 Pet. Rep. 58.

Fleming & Daniel on the same side.

Appellants' counsel submit that—

1. If the court had jurisdiction of the subject matter of the petition;
2. If the plaintiff was a party to the proceedings and properly before the court;
3. If the decree and sales thereunder are not set aside for fraud;

Then the decree of Judge Putnam is conclusive as to the plaintiff's right, and the court had no power to set aside the sales made thereunder.

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ject matter is conclusive between the parties, unless reversed or set aside for fraud." 1 McLean, 460.

We assume that all of the presumptions are in favor of the proper exercise of its powers by courts of general jurisdiction.

"The decision of a competent court will be presumed to be according to law until the contrary is proved." *Wade vs. Dick*, 1 Iredell Ch., 323.

The record of a court of limited jurisdiction must show that jurisdiction was rightfully exercised, but in courts of general jurisdiction it will be presumed. *Grignon vs. Astor*, 2 How. 319, 343; *Kemp vs. Kennerdy*, Peters' C. C. Rep., 30.

"Every reasonable presumption is to be made in favor of the judgment or decree of a court of general jurisdiction." 2 Wallace, 328, 341; 5 McLean, 167.

That the subject matter of the petition was within the jurisdiction of the court is apparent, and we presume will not be denied.

Was Samuel A. Winter a party to the proceedings before Judge Putnam on the petition of James L. Winter, executor, and properly before the court?

The court is charged by the statute with the proper and discreet care of the infant's rights. The statute vests in the court jurisdiction of the infant as a party to the proceedings as soon as the petition is filed, and by virtue of such filing, as completely as it does of the adult heirs when properly cited and brought into court. No citation of the infant is required. He is before the court by operation of the law.

The court is not to appoint a guardian to appear for the infant as required by the statute of New York, cited in the case of *Bloom vs. Bendick*, 1 Hill's Reports, page 140, relied on by plaintiff's counsel in the argument of this cause before the Circuit Judge.

The court is directed to appoint guardians to such of the heirs or devisees as are infants, to answer and defend against said petition.

Before an answer can filed or a defence made, the party must be before the court.

In the ordinary practice of the courts, the infant would first be served with notice. This is the first step, and brings the infant before the court.

An order is then made on the proper application appointing a guardian to answer and defend for the infant in the matter before the court.

The appointment of the guardian to answer and defend presumes that the infant is before the court and under its jurisdiction by operation of the law.

The jurisdiction over the person of the infant does not attach from the act of appointing the guardian. That act is a consequence of the jurisdiction which has already attached by the operation of the statute and one step only in the proceedings in the cause.

"Any movement by a court is necessarily the exercise of jurisdiction."

The power to hear and determine a cause in jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. 2 Howard, 338; 6 Peters, 709; 12 Peters, 718; Ibid., 623; 3 Peters, 205.

If jurisdiction over the person as well as of the subject matter of the petition attached, then it is not competent for the court to enquire whether mere errors or irregularities exist in the proceedings on which the order of sale was made.

The errors of the court, however apparent, can be examined into only by appellate power. 10 Peters, 450, 472.

A decree in partition cannot be examined into in a collateral action to see whether errors and irregularities exist in the proceedings. Parker vs. Kane, 22 Howard, 14.

"An order for the sale of a decedent's real estate granted by a Probate Court, is conclusive as to the necessity and propriety of the sale, if the facts necessary to confer jurisdiction appear on the face of the proceedings." 3 Wallace, 396, 406.

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When a court, from its general powers, has jurisdiction of the subject matter, a due notice served on the party, if the proceedings be in *personam*, or an attachment laid on the lands, if the proceedings are *in rem*, gives jurisdiction, and after this attaches no proceedings in the subsequent stages of the case, however erroneous, will make them void. 4 McLean, 449; 1 McLean, 224.

"The purchaser of lands sold under the decree of " a court of competent jurisdiction, is not, in a collateral suit, affected by any errors or mistakes in the proceedings." 2 Peters, 157; 5 McLean, 148.

The court does not enquire into the regularity of the proceedings in courts of co-ordinate jurisdiction. Platt vs. Cadwell, 9 Paige C. C. R., 386.

The jurisdiction of a court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and decide it at all. 7 Peters, 572.

There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. 10 Peters, 449.

The principle is too well settled, and too plain to be controverted, that a judgment or decree by a competent tribunal against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal, and that if the judgment or decree be erroneous, the errors can be corrected only by a superior appellate tribunal. 4 Peters, 470.

The errors and irregularities of any suit are to be corrected by some direct proceeding either before the same court to set them aside, or in an appellate court. 2 Peters, 157.

In the case at bar, it is contended that the plaintiff is not bound by the decree of Judge Putnam, because—

I. There is no order appointing a guardian to answer and defend.

2. Frederick Von Santen, who is the brother-in-law of the petitioner and statutory guardian for the plaintiff, answers for his ward.

We submit, in the first place, the court having jurisdiction of the parties and the subject matter, that under the decisions which have been cited, this court cannot enquire whether or not these errors or irregularities occurred or exist.

But grant that these are proper questions for this court to consider, we hold further, that there is no proof before the court that there was not an order made in due compliance with the technical requirements of the law appointing Frederick Von Santen to answer and defend for his ward.

The presumption is unavoidable from the authorities cited, that such an order was made by the court, for the court was one of general jurisdiction and all the presumptions are in favor of the regularity and propriety of the proceedings of such a court until the contrary be proved.

But it is claimed that Von Santen, having married the plaintiff's sister, was "of kin," and therefore incompetent under the statute to act as guardian in the proceedings before Judge Putnam.

We hold that only in a loose and general sense can the term "of kin" be construed to include one who is simply connected by marriage. The true legal signification of the term is relationship by blood or consanguinity, not that kind of relationship which results from marriage, and which is known as affinity. Bouvier's Law Dic., title "Kindred;" Burrell's do., title "Next of Kin."

It was in this sense that the Legislature used the term.

In this case, by the terms of the will, Von Santen could have no possible interest in the property.

If there is a doubt as to the intention of the Legislature in the use of the term, the benefit of the doubt, at this late day, should certainly be cast in favor of the legality and propriety of the proceedings on which the order of sale

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was made. But even though "of kin" was intended to include relations by affinity as well as consanguinity, this court cannot interfere to set aside the proceedings because of this *irregularity*, as has been abundantly shown by the authorities cited above.

We have shown that the court had jurisdiction of the person of the infant by the operation of the law; that Von Santen was cited by the court to answer for his ward; that he did so in substantial compliance with the statute; that full and elaborate proof was taken and every possible precaution adopted by the court to protect the rights of the infant. No substantial defence of the infant is omitted; no substantial right of the infant is defeated.

"When, on sale of the estate of infants by their guardian, the statute regulating such sale was not complied with in many points, and a writ of error to set aside such sale was not presented until such sale was completed by payment of the purchase money and a conveyance, and no substantial object of the statute or interest of the ward was defeated, it was held that the sale would be affirmed." 9 Dana, 526.

But the plaintiff charges fraud and relies upon this as an additional ground to set aside the decree of Judge Putnam and the sales thereunder.

There are but two grounds upon which this charge can be sustained:

1. Collusion between the *purchasers*, the *petitioning executor* and the *statutory guardian*, *Von Santen*.

2. Constructive or legal fraud arising from an alleged interest of the executor, James L. Winter, in the purchase.

"Fraud is not to be presumed, but must be proved." 5 Fla., 305, 478.

"It is not the policy of the courts to enlarge the catalogue of legal frauds." 2 Stewart, 51, 52.

There is nothing in the testimony to connect the guardian, Von Santen, in anywise with the purchase by Bowden, and the other purchasers at the commissioners' sale.

Let us see, now, what proof is produced to establish collusion between the petitioning executor, James L. Winter, and the purchasers at the commissioners' sale.

The evidence on this point resolves itself into the statement made by Emery in his answer to the seventh cross-interrogatory, that he understood that Miles Price and James L. Winter were desirous of purchasing the Dell's Bluff tract, while Bowden and Price both testify distinctly that he purchased for Price alone and at his sole instance and request. J. N. Haddock also admits that James L. Winter was to have an interest in the Alachua tract.

Now, while this testimony may go to show that James L. Winter desired to take an interest in the Dell Bluff and Alachua tract, it appears further, that in fact he had no share or part whatever in the purchase of either, never having paid one cent of the purchase money, nor received any part of the title or estate. But even though he had done so, the court will not construe the law to prevent the executor, being an heir, from bidding on equal terms with other heirs at a judicial sale of the lands of his testator, the sale being made by a commissioner, and not by himself. And even though he had purchased the lands at his own sale, we hold that if the property brought its full value, and there is no fraud proven, the court will not set the sale aside. It is true that the English decisions and some of the American are in favor of an extended application of the rule that executors and administrators cannot purchase at their own sales—(not, however, that this was a sale made by commissioners appointed by the Circuit Court; that the matter was taken wholly out of the hands of the executor who had no other or greater connection with the sale than any of the other heirs, nor is it to be presumed any greater knowledge of the character and value of the property.) These decisions are, however, generally based upon a different state of facts than those at bar. As will be noticed, they have been usually made by the executor or administrator in his official

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capacity, without special authority; hence the necessity for the rule. 2 Stewart, 51.

It is the policy of the law to narrow the catalogue of legal frauds. *Ib.*, 52.

The inference deducible from these decisions is that an administrator, when he has an interest in the estate, may purchase, but, when he has a mere naked trust, he cannot. 2 Stewart, 52.

"An administrator, entitled to a share in the estate, may lawfully purchase to the extent of his interest." 2 Williams on Ex., p. 801, note.

There is no proof in the case at bar that James L. Winter even proposed to purchase more than the extent of his interest in the lands as one of the devisees under his father's will.

In the case of Brannan and others vs. Oliver, (2 Stewart's Reports,) to which the court is specially referred as affording a remarkably clear and concise summary of the law on this subject, the Supreme Court of Alabama say, in closing:

"This course of reasoning has brought my mind to the conclusion that the purchase of the administratrix is *prima facie* valid because divested of all unfairness." 2 Stewart, page 54.

"That the administratrix was herself the purchaser, does not render the sale void." 1 Hill Ch., 461.

"An administrator, selling the personal estate of his testator under the order of the ordinary, is allowed to become a purchaser when he sells fairly and pays the full value." 2 Hill Ch., 405; so also 8 Iredell's Equity, page 201.

"An administrator may purchase at a sale ordered to be made by a commissioner for the payment of debts." Peters' C. C., 365; 2 Mass., 531.

Again:

"A purchase by an administrator not entitled to a share is not absolutely void, but may be confirmed or set aside at the election of the parties interested in the estate." 2 Williams on Executors, page 801 and authorities cited in note.

In the case at bar, the executor at most only contemplated a possible interest in the purchase; in fact, he derived no interest in estate therefrom, either equitable or legal, and, being dead, can never do so.

The executor was one of the devisees under the will and had an interest in the lands.

The sale was by a commissioner under a judicial order, at public outcry, after due notice, open and fair.

The consideration was ample and just. The sale has been approved by the court and acceded to and confirmed by the heirs themselves.

We can find no fraud here, either actual or constructive, to authorize the court to set aside the sale, or to disturb, in a collateral action, the decree upon which it was made and the solemn order of the court approving and confirming it.

Plaintiff's counsel rely on the case of Michoud and others vs. Girard and others, 4 Howard.

Admit the strength of this case as indicating the opinion of the United States Supreme Court upon the statement of facts therein set forth. The case in 4 Howard is not, however, parallel to the case at bar. In the Michoud case, the purchaser at the sale bid the property off as the avowed agent of and for the executor, who stood by and directed the sale and afterwards took a conveyance of the property and appropriated it to his own use. We consider that the Supreme Court enunciated the old English doctrine much too strongly, but do not consider that this court is at all bound thereby. The reason assigned for their decision by the Supreme Court is, that "*public policy*" requires a rigid adherence to the old rule.

Now, the same court, in the case of Delmas vs. Insurance Company, 14 Wallace, 666, says:

"When a decision" "is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review; like, in many other questions

of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other."

While, therefore, the opinion of the Supreme Court of the United States is at all times entitled to great respect and weight when based upon reasons of public policy, it is not to be held as binding upon a State court on a similar state of facts.

But as we have before stated, the case at bar does not assimilate in its character to that in 4 Howard. The executor, James L. Winter, had no connection whatever with the sale, nor with the bidders or bidding at the sale—never paid a dollar upon the property, nor received any title, equitable or legal, to the lands.

"The protection of infants which courts have given, is a shield of defence and is not to be used as a weapon to injure others." 7 Cowen, 179, 181; 15 Mass., 359; 13 Mass., 37.

And besides, it is only in case of *gross fraud* that courts will entertain an original bill to set the proceedings aside.

"In the case of gross fraud or collusion used in obtaining a decree, the courts will entertain an original bill for the purpose of impeaching it." 1 Daniels' Ch., 167, note and text; *ib.*, 153; 2 P. Wm., 73; 3 P. Wm., 111.

Why should the complainant attempt thus collaterally to disturb the solemn adjudication of these questions by a court of competent jurisdiction?

"In general, however, when no fraud is alleged, (in the case at bar no fraud is proved,) the proceedings to set aside a decree, if it has been signed and enrolled, must be by bill of review, or if not signed and enrolled, by supplemental bill in the nature of a bill of review." 1 Daniels' Ch., 167, note 1.

"If the infant seeks to impeach the decree by showing that he had grounds of defence which were either not before the court or not insisted on at the original hearing, he

may apply to the court for leave to put in a new answer." 1 Daniels' Ch. 107.

"An infant, however, wishing to make a new defence, must apply to the court as early as possible after attaining twenty-one, for if he is guilty of any laches the application will be refused." 1 Daniels' Ch. 162.

If, in the case at bar, the plaintiff has waited too long after reaching his majority, it is his own fault.

Complainant's counsel will argue that Winter did not know the land was sold and purchased by Price, but he had the opportunity of establishing this want of knowledge by his oath, but he did not do it. He dare not swear that he did not know it. He was nineteen years old at the time of the sale, and the presumption is strong, strong as the most positive proof that he did know.

But complainant's counsel attempt to impeach the decree of the Circuit Court in the petition of the executor of James Winter on the ground "that the will directs that the lands be divided in kind, if a fair and equal division can be had of them in that way."

Now this was the very issue before the court. The statute conferred jurisdiction upon the Circuit Court on petition of the executor to decide whether or not it was necessary to sell the real estate of the decedent in order "to make more equal distribution among the heirs, devisees or legatees." Thomp. Dig., p. 203, sec. 6.

The statute could not have been framed more aptly to meet the language or intent of the will of James Winter. The executor submitted to the court whether or not a "fair and equal" distribution of the lands of his testator could be had without a sale. The court, after a careful, deliberate and legal examination into the facts; decided that a sale was necessary and so decreed.

This court cannot, especially at this late day, reverse the exercise of judgment by the former court in a matter over which under the statute it had full and complete jurisdiction.

But we make the further point that the plaintiff, having voluntarily and with the knowledge of the fact, after reaching his majority, accepted from the defendant, Miles Price, \$500 in Jacksonville and Columbia county bonds as his portion of the proceeds of the sale of said lands, is estopped from saying that said sales are null and void, and must be decreed to have confirmed the same.

The decree of a court directing the sale of real estate for the purpose of division between an infant and others, to which the infant was not made a party, is not conclusive upon the infant, so far as such decree undertakes to pronounce upon the extent of his interest, but if he takes under the sale made in pursuance thereof, he may be estopped, from saying that the sales are void, for by receiving so much of the proceeds as properly belong to him, he affirms the sale, but is not estopped from contesting the other portion of the decree. 5 Florida, 543; *ib.*, 111.

"The deed of an infant ordinarily is not void but merely voidable." 3 Washburn, 225-6; 10 Peters, 70-1

No contract of an infant is so absolutely void that it cannot be confirmed by the infant at full age. 3 Cranch C. C. R., 276.

There is a well recognized distinction between the nature of those acts which are necessary to avoid an infants' deed and the character of those which are sufficient to confirm it. Such a deed cannot be avoided except by some act equally solemn with the deed itself. But acts insufficient to avoid such a deed may amount to an affirmance of it. Mere acquiescence, though long continued, will not suffice; yet, even that, in connection with other circumstances, may establish a ratification. 9 Wallace, 617.

A sheriff's deed, if valid, is as efficacious to work an estoppel against the claim of an execution debtor as one executed by him voluntarily. Bigelow on Estoppel, 283, note 1.

It appears from the testimony of Miles Price, that during the war he purchased and paid for the distributive shares of

the different devisees under the will in the fund arising from the sale of the real estate of James Winter. The value of these shares severally was fixed at \$500 by agreement among the parties, and after consultation with the Probate Judge, who had the custody of the papers of the estate. This testimony is confirmed by the testimony of Aaron W. DaCosta, and also by that of Frederick Von Santen, and is not controverted by any proof on the part of the plaintiff.

It appears further, from the testimony of Miles Price, that he transferred \$500 of stock in the bank of St. Johns, at Jacksonville, to Frederick Von Santen, as guardian for Samuel A. Winter, in payment for the residuary interest of the said Winter in his father's estate, including the unpaid instalments on the commissioner's sale of lands.

This testimony is also corroborated by that of Von Santen and not denied by the plaintiff, and so far as the transfer of stock is concerned, it is strengthened by that of J. H. H. Bours, late cashier of the Bank of St. Johns, who shows the transfer to have been made in July, 1861.

Appellant's counsel also introduced the written acknowledgement given by Von Santen to Price at the time of the transfer of this stock.

This bank stock was secured by bonds of the city of Jacksonville and Columbia county to the same amount which were deposited with the Comptroller of the State to secure the issue of the bank.

For authorities to show what acts amount to a ratification by an infant after reaching his majority of his deed or other acts, see authorities cited in brief of Finley and Finley.

For the reasons assigned we hold:

That the sale by the commissioners having been made without fraud under the order of a court of general powers, having jurisdiction of the subject matter and of the person of the infant defendant, now plaintiff in this action—the statute having been substantially complied with, and no defence of the infant omitted or right defeated—is final and conclusive as to the plaintiff's rights in the premises.

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That by accepting from the defendant, Miles Price, ten years after he had obtained his majority, voluntarily and with full knowledge of all the facts, his distributive share of the proceeds of the sale of said lands, the plaintiff ratified and confirmed said sale and cannot now avoid the same.

The court, therefore, erred in setting aside said sale and in the finding of law and fact upon which said judgment is based.

J. M. & J. H. Baker for Appellees.

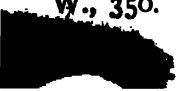
The testimony in this case shows that when proceedings were instituted for the sale of the lands in controversy, Samuel A. Winter was a minor residing in Charleston, S. C., with his regularly appointed guardian, Von Santen, both non-residents, and beyond the jurisdiction of the courts of this State. That the court ordered notice of the proceedings to be given to the guardians of such of the heirs as were minors, Samuel A. Winter and Georgia Winter being the minors. Notices were issued to Von Santen, guardian of Samuel, and to James L. Winter, trustee and guardian of Georgia, who was also the petitioner and brother of Georgia.

It does not appear from the record in the proceedings had for the sale of the lands that any *guardian ad litem* was appointed as required by statute. Thomp. Dig., 204, Sec. 7.

In the proceedings for sale and distribution of the lands of the Winter estate on petition, James L. Winter, executor, the court, in failing to appoint a *guardian ad litem* for the minors, acquired no jurisdiction.

The minors were not legally before the court, and the decision and decree in the case was as to them null and void. 2 Fl., 531; 1 Hill N. Y., 130; 11 Fla., 71.

"When a special authority is conferred even on a court of general jurisdiction, which is exercised in a mode different from the common law, it must be strictly pursued and the record must disclose the jurisdiction of the court." 18 W., 350.



The order to give notice to Von Santen rebuts any presumption of the existence of any order appointing a guardian *ad litem*; the appointment of guardian *ad litem* not appearing of record, notice to Von Santen would not be a compliance with the statute.

1. He was a non-resident, and hence not within or subject to the jurisdiction of the court.

2. Because he was of kin to the petitioner, and under the spirit of the statute he ought not to be entrusted with the defence of the infant.

3. He was the regular guardian and could not represent his ward in the courts. Thomp. Dig., 326, Sec. 4.

The New York statute is similar to the statute of this State and does not require notice to infants in suits for partition. It has been held in that State, that to bind minor's rights by a judgment in cases of this kind, it is necessary to get jurisdiction either by publication, summons, or by appointment of *guardian ad litem*. 1 Hill, 139.

The judgments and orders of courts of general jurisdiction may also be set aside, when they have acquired jurisdiction, by chancery courts for surprise, fraud or unconscionable advantage taken. 12 Fla., —; 1 Story Eq. J., § 252; 2 ib., 1252; 7 Peters, 616.

Fraud.—In this case the sale of the real estate under the order of court was void, not only for want of jurisdiction over the minor plaintiff, but also on account of fraud and collusion.

Evidence of Collusion and Fraud.—Jams L. Winter, who filed the petition for sale and distribution, was acting executor and trustee under his father's will, which directed a division of the land, the female heirs to have a life estate therein, remainder to their children; the petitioner appointed trustee. See Will, 55, clause 4.

He procured the appointment of Emory, his attorney's clerk, to take testimony in the partition suit. He also

procured his appointment as commissioner and it appears that he was the acting commissioner.

The petitioner, as guardian and trustee for Georgia Winter, one of the minor heirs, acknowledged service of citation and made answer denying the truth of his sworn allegations in his petition for sale.

That he procured the order for sale for the avowed purpose of becoming a purchaser of the lands himself.

That his attorney, Sanderson, advised him that he could not purchase the lands in his own name, being executor, without violating his oath.

That the only payment made was a pretence and a sham. This was paid by Price, the defendant, to J. L. Winter, his co-purchaser, in the presence of Emory, commissioner, and no receipt given or received, and no evidence that the money so paid was ever paid to the heirs.

The commissioners did not require the terms of sale to be complied with. Hoeg testifies: "I never, at any time, received any money from any of the parties as consideration. I never, at any time, received any bonds, money, notes, or mortgages for or on account of the sale of these lands."

Henry Howell testifies: "I bought the Alachua tract. * * * I did not execute any mortgage for it. I paid nothing on the purchase."

Uriah Bowden testifies: "I did not execute any mortgage to secure the payment of purchase money, or give any note at the time or afterwards." Also, "I did not pay any money when I received the deed after the war from commissioners, nor did I give them any note or mortgage. * * * At the time I executed the deed to Price, no consideration passed from Price to me."

Miles Price testifies: "I don't think I tendered any note or mortgage. I did not sign any to secure other payments."

Emory did not execute deed for the Dell Bluff to Bowden until 1866, and not upon compliance with the terms of sale, but upon Emory's statement that "the relinquishment of

all the heirs and distributors of the estate of James Winter having been first shown the witness."

• If any such relinquishment was shown Emory, it was false. Price, the defendant, in his testimony admits that he had no relinquishment from J. L. Winter and Henry Jourdan, who married one of the daughters.

In another place he admits "it was understood between Joseph Haddock and myself that I was to have his share."

Emory signed the deed to Bowden either in collusion with Price or under a mistake and fraud, and without consideration, and Hoeg signed because Emory had signed, who was the only active commissioner. See Hoeg's testimony.

Emory was paid as commissioner one hundred dollars by Price in 1866, the only consideration he received. Emory's testimony.

That procuring a third person to bid off the property when he was acting in the fiduciary capacity of trustee and executor, was a badge of fraud and a disregard of the trust that was confided in him. The testimony shows a collusive agreement between defendant Price and James L. Winter to procure the purchase of the Dell Bluff for their joint interest, by their suit against Bowden.

The following extracts from the testimony show conclusively that James L. Winter, the executor, was interested in the purchase of said lands:

"The Alachua tract was bid off for James L. Winter and myself by Henry Howell." Testimony of Haddock.

"Uriah Bowden bid off the Dell tract. I have heard Miles Price say that Bowden bid off the Dell Bluff tract for him (Price) and James L. Winter." Testimony of D. R. Howell.

"I think the title made was for the Dell Bluff property. My understanding was that Miles Price and James L. Winter bought the property, but Bowden was mixed up in it some way." Testimony of commissioner Hoeg.

"From what Miles Price told me, he (Price) and James

L. Winter bought the Dell Bluff place." Testimony of Miles Anthony.

"I bought the Alachua tract. I bid it off for James L. Winter, executor, and Joseph N. Haddock." Testimony of Henry Howell.

"I always understood that my husband and Miles Price bought the entire Winter tract in partnership. I am under the impression Mr. Price told me so much himself about three or four weeks ago. In a conversation with Miles Price, he told me that he and my husband had bought the place together, and that he (Price) had paid a certain sum for it." Testimony of Teresa Winter, widow of James L. Winter.

"I understood, at the time, that Miles Price and James L. Winter were desirous of purchasing the Dell Bluff tract: that the executor could not be a bidder under his oath, and Uriah Bowden was the purchaser for Price and Winter. All the matters of said sale were arranged in accordance with such understanding, Colonel Sanderson, attorney of said estate, so advising." Emory's testimony.

Mr. Price, in his testimony, says: "I authorized Bowden to bid off the Dell Bluff tract for me. It was understood between me and Bowden that I was to be responsible for the purchase money;" but Price nowhere denies that J. L. Winter was joint purchaser with him. His attorneys did not venture to ask him the question.

The testimony of A. W. DaCosta, taken on behalf of the defendant, shows conclusively the interest of Winter, the executor, in the purchase of lands, as well as the collusion between him and Price to cheat and defraud the heirs for their joint benefit. He says that J. L. Winter "was present" (at the time and place of receiving quit-claim deed from the heirs.) "participating; he seemed to be engaged in bringing about the sale to Price by the heirs." Testimony of DaCosta.

Von Santen, the guardian, was present at the same time,

and, in collusion with Winter and Price, made the illegal transfer of his ward's interest to Price. Testimony of Von Santen.

Law of Actual and Constructive Fraud Applicable to Testimony Quoted.

Fraud is defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another. 1 Story Eq. Jr., § 186.

Implied or constructive fraud, indeed, properly includes all arts, omissions or concealments which involved a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another. 1 Story Eq., § 187; 19 Barbour, 251.

Fraud may be collected and inferred from the nature and circumstances of the transaction as being a breach of trust or confidence, or imposition and deceit on another person. 1 Story Eq. Jr., § 188.

He that is voluntarily concerned in the commission of a fraud by another, shall never be permitted to obtain the benefit or profit thereof against those who have been defrauded. 1 Story Eq. Jr., § 423.

When Winter qualified as executor, he accepted the trust conferred by the will.

He violated that confidence by acting contrary to the express injunction of the testator and committed acts which involved a breach of legal and equitable duty to others, and that, too, for his own private interest and profit.

1. The fraudulent interest is shown in the application for order of sale.

2. In the manner in which the application was prosecuted and conducted.

3. And also in the circumstances surrounding the sale and purchase, and the efforts to acquire titles.

The testimony to establish these propositions has been quoted above, and also authorities applicable to the two first.

We now proceed to the discussion of the law bearing upon the third proposition.

The purchase by a trustee or executor at his own sale is void, and it is immaterial whether purchase is made at public sale by another, or in the name of another as agent. *Hill on Trustees*, 159; 538; 3 *Vesey*, 678; 6 *ib.*, 631.

The principle applies invariably to all who come within it. No party can be permitted to purchase an interest in property, and hold it for his own use, when he has a duty to perform in relation to such property inconsistent with the character of purchaser for his own use. *Hill on Trustees*, 159; 4 *Cowen*, 717; 4 *Kent*, 438; 6 *Paige*, 364; 12 *Iredell*, 73; 8 *Wheaton*, 441; 2 *Sugden*, 365.

By the policy of the law as administered in the courts of equity, the purchase was fraudulent and void, upon the ground that it was made by the intervention of a person (*Bowden*) who was a nominal buyer, and purchased for the executor for the purpose of conveying to him.

Such a transaction carries fraud on its face. 4 *Howard*, U. S., 553.

The rule stands upon the great moral obligation to refrain from placing ourselves in relations which ordinarily excite conflict between self-interest and integrity. Persons having a confidential relation, if permitted, might avail themselves of the information they would acquire for their own benefit. 4 *Howard*, U. S., 555.

It is contended by the appellant that the sale having been made by commissioners in the case, it does not come within the rule laid down in 4 *Howard*, *Michoud et al. vs. Girard et al.* In that case, there were two sales—one made by the parish judge—(see statement of the case, page 508)—the other made by a deputy register, (page 513.) The same point was made in that case by defendant's counsel, and not sustained. 4 *Howard*, record of case, 542.

The same rule applies when the sale is judicially made and

conducted by a Master in Equity. 9 Paige, 241; 3 Paige, 179; 4 Howard, 553.

The only way in which a person acting in a trust capacity can purchase at a sale of the trust property, is to procure an order of court authorizing the purchase. Sugden on Vendors, 378; 3 Paige, 178; 4 Howard, 557.

The case in 2 Stewart Ala. Reports, referred to by defendants' counsel, has subsequently been overruled by the case quoted by us from 4 Howard.

The court, in that case, alludes to decisions made in some of the chancery courts of the United States, where it has been held that an executor may purchase, if without fraud, any property of his testator at open and public sale, and that such sale is only voidable, not void. But, says the court, with all due respect for the learned judges who have so decided, we say that an executor and administrator is, in equity, a trustee for the next of kin, legatees and creditors, and that we have been unable to find any one well considered case to sustain the right of an executor to become the purchaser of the property which he represents, though he has done so for a fair price, without fraud, at a public sale. 4 Howard, 557.

The testimony shows that the sale was conducted solely by commissioner Emory, Hoeg not being present.

It is a well established rule that in the exercise of a public as well as a private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. 3 N. Y., 401; 21 Wend., 178.

The duties to be performed at a commissioners' sale are not exclusively ministerial. The commissioners may employ an auctioneer to proclaim the sale and receive bids, but they must themselves determine when to commence the sale and how long it shall be kept open, and whether the sale shall be postponed. These and other similar questions that may arise at the time of the sale, are so far judicial as to re-

quire the presence of both commissioners for determination. 3 N. Y., 407.

The sale of said lands was also void on account of further irregularities.

It appears from the advertisement of sale of the lands that no time and place was fixed for the sale by the commissioners. The sale having been made at public auction, notice of the time and place was necessary to secure competition by bidders, and to make the sale fair and legal. It does not appear from the record what was the date of sale. Neither the commissioners nor the purchasers complied with the order of court approving sale, and the deed was executed without authority, and consequently void. 8 Peters, 166-7.

If Price could hold under the commissioners' sale, it could only be in strict compliance with the terms of the sale and the order of court, and not by a speculation on the heirs by purchase of their interest at a discount. 8 Peters U. S., 146.

When he undertook the purchase of the claims of the heirs, he abandoned his right under commissioners' sale, (if he had any,) and in so far as commissioner Emory gave his aid and approval, he acted in violation of his duty and with collusion and fraud.

When the deed was executed to Bowden, the commissioners were "*functus officio*."

About seven years previous, at the time of the confirmation of sale, it appears from the evidence that they executed a deed to Bowden, which they did not deliver, the purchaser not having complied with the terms of sale or order of court.

It is also in evidence that the terms of sale never have been complied with, and claims under the sale thereby abandoned by purchasers. Hoeg's testimony.

The sale appears to have been made in 1858. Commissioner Emory admits that it was not carried out in accordance with the order of court, and attributes the failure to the

war and the fact that he was carried North in 1863; but the sale should have been carried out long before the war.

The efforts made by Price and Winter, the executor, to buy up the interest of the heirs at a discount, will never satisfactorily account for the collusive delay in carrying out the decree of court. Testimony of DaCosta.

Confirmation.—The attempted defence of confirmation is based upon circumstantial evidence and upon inferences, and not on direct and positive testimony, and is directly and persistently denied by the plaintiff, Winter.

Neither of the witnesses swear that the plaintiff (Winter) read the papers handed him by Price at his house, or that they were explained to him, and the plaintiff swears that he did not read them sufficiently to get the purport of them; that he did not know their contents. Testimony of Winter.

Price swears that he told Winter that the bank stock was to pay for his interest in the real estate. Winter swears "he did not tell me on what account it was coming to me, nor did I ask him. Nobody there informed me, to my recollection, that these bonds were in payment of my share in the real estate. My impression was that there had been money long years before deposited in the bank here for me, either from the hire of slaves or sale of perishable property. If I had know it, I would not have taken it." Testimony of Winter.

It is not shown either by the correspondence on the subject with his guardian, by the testimony of Von Santen or by the order for the money or stock, that the plaintiff was informed that the bank stock or bonds were the proceeds of the sale of his interest in the real estate to Price. Neither the correspondence nor order allude to that sale. See letters and order.

The fact that no allusion was made to the sale in the order of correspondence, and no receipt required from Winter, S.C. R. 15—7

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confirms the want of knowledge in the plaintiff and supports his testimony.

The fact that the account between the guardian, Von Santen, and his ward had never been settled raises the presumption of a want of knowledge on the part of the plaintiff.

Law on Confirmation.—In equity, as long as a party injured does not know his rights to their full extent, any act done by him subsequently will not amount to a ratification or confirmation. 1 Story Eq. J., § 345 and note; 3 Howard U. S., 333.

The court will not permit transactions between guardian and ward to stand even when they occur after minority had ceased, when the time is short or when the accounts between them have not been fully settled, or the estate remains in some sort under the control of the guardian, unless the circumstances demonstrate in the highest sense of the terms the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian. 1 Story Eq. J., §§ 317, 323.

It is a general rule that whenever any contract or conveyance is void, either by positive law or upon principles of public policy, it is deemed incapable of confirmation. 1 Story Eq. J., § 306.

If confidence is reposed and that confidence abused, courts of equity will grant relief, and to establish the defence of confirmation in such cases, it lies upon the defendant, by distinct and explicit testimony, to bring home to the plaintiff the full knowledge of the facts. 19 Wend., 301; Hill on Trustees, 169; 1 Story Eq. J., § 308.

In the case of *Michoud et al. vs. Girard et al.*, 4 Howard, 561, it was held that the receipts and acquittances given by two of the complainants to the executors do not affect their rights; they were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate.

When there is an allegation of fraud, the defence of con-

firmation will be watched with the utmost strictness. The general rule is, that whenever any contract or conveyance is *void on account of fraud*, it cannot be confirmed. Hill on Trustees, 538; 15 Johns. R., 585; 4 ib., 536.

WESTCOTT, J., delivered the opinion of the court.

James L. Winter, executor of the last will and testament of James Winter, deceased, filed his petition in the Circuit Court of Duval county, in the year 1857, alleging that the land which the testator directed should be divided between the devisees under the will could not be equally, fairly and beneficially divided. The parties interested in the estate were named defendants in the petition, and among them was the plaintiff in this cause, who was at that time an infant about eighteen years of age and a resident of the State of South Carolina. A sale was had under these proceedings, the order for the sale being dated the 22d of October, A. D. 1858. The defendants, Price, Howell and Hall, were purchasers at said sale and now claim interests in the land under the sale. No objection is urged in this action to the sufficiency of the petition in these proceedings.

The plaintiff Winter, through this action, seeks to set aside this sale upon several grounds. He insists that as to him the sale is void for two reasons:

First, Because the court did not have jurisdiction of his person; that he was served with no process; that, although he was a non-resident infant, no publication was made and that no guardian *ad litem* was appointed.

Second, Because the executor was interested in the bids by which the defendants acquired their interest in the land. Plaintiff also charges fraud and collusion between several parties to the proceedings, and also insists that there are such errors and irregularities in the proceedings as require the sale to be set aside in his behalf.

The irregularities complained of are that his statutory guardian, who was permitted to appear and represent him,



was of kin to the executor, being his brother-in-law; that while two commissioners were appointed, only one was present conducting the sale; that no time and place was named in the advertisement for the sale by the commissioners, and other irregularities of like character.

We examine these questions stating the case as it appears from the petition and the proceedings for sale in the Circuit Court, and the record and the evidence in this action.

The question of jurisdiction and the alleged irregularities we consider first, as they can be more readily embraced under the same head.

It appears from the record of the proceedings that Frederick Von Santen, the statutory guardian of the plaintiff, acknowledged service of citation for the plaintiff, that he filed an answer alleging infancy, denying all the allegations in the petition, and submitting his interest to the court. Without any formal appointment of a guardian *ad litem*, the citation was served upon the statutory guardian who appeared and defended the action, putting in the defences required by the statute.

Two questions arise here. Was it necessary that the citation should have been served upon the infant? If not, does not the appearance of the statutory guardian, his recognition by the court and his defence of the suit, constitute him guardian *ad litem* without the formality of an appointment, and is this not sufficient under the statute to give jurisdiction?

Let us understand precisely and accurately the nature of the subject which we are treating.

The Circuit Court in the proceedings for the sale was dealing with the estate of a deceased person and the inheritance of an infant. What were its powers in reference thereto? Even admitting that in this proceeding the Judge of the Circuit Court was exercising chancery powers, which we think is not the case, as it is a special proceeding in which chancery powers are not brought into action, still

there is no doubt that all the power and jurisdiction which the court exercised in the matter of the sale of the infant's inheritance was derived from the legislative enactment. The inherent and original power of a court of chancery does not extend to a sale of the inheritance of an infant. Lord Hardwicke in 1750 said, "There is no instance of the courts binding the inheritance of an infant by any discretionary act of the court. That would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." 2 Ves. Sr., 23; 6 Beav., 97; 10 Leigh, 421; 18 Gratt., 663; 6 Hill, 414; 4 Comst., 257; 3 Bland Ch'y, 186; 8 How., 556. We thus see that this is a proceeding within the control of the legislative department of the government. There is no doubt of its plenary power over the subject matter of the inheritance. It creates the right to the inheritance by enacting rules of descent, and gives as well as regulates the right of making testamentary dispositions. There is a paramount power in the government to direct in what manner the land of the decedent may be distributed, and if it be impracticable to make division in kind where a division is directed, it may sell the property and distribute the proceeds. Nor can it be doubted that the power exists in the Legislature to authorize the sale of an infant's interest in the estate of his ancestor *without notice* of the proceeding to the infant. This matter was discussed in the case of *Florentine vs. Burton*, 2 Wall., 210. In that case the administrator was authorized to sell at private sale with the approbation of the court. The act required no notice to be given, and in the record of the proceedings before the court there was no mention whatever that any notice had been given to heirs or to any person. The Supreme Court of the United States sustained the title of the purchaser and asserted that the Legislature had not exceeded its powers. See also 4 Scam., 134; 19 Texas, 369.

In proceedings under the statute it is thus apparent that a compliance with the enactment is sufficient. If the act

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does not require notice to the infant, and prescribes any other method by which the court is to acquire jurisdiction of the person, then compliance with that method is all that is necessary, and while, in all cases, it is better to give notice to the infant or some near relative, still it is not essential if it is not required by the statute. The act in this State requires "the court to order citations to all the heirs or devisees *who are of full age*, and to the husbands of such as are *femmes covert* requiring them to appear upon a particular day mentioned therein at a regular or adjourned term of the court, not less than thirty days from the time of issuing such citations and answer said petition, and it shall be the duty of said court forthwith *to appoint guardians to such of the heirs or devisees as are infants* to answer and defend against said petition, which guardian shall not be the petitioner or of kin to the petitioner or his attorney or agent." The act provides further that "it shall be the duty of the guardian appointed as aforesaid to deny all the allegations contained in said petition without being verified by oath, and if necessary to employ counsel to defend his ward or wards." As to non-residence the statute provides "that if the petitioner shall make oath that any of the heirs or devisees are *of full age* and live beyond the limits of this State, or that their residence is unknown to the petitioner, a notice by advertisement * * * shall be given." (The italics in these quotations are made by the court.)

To acquire jurisdiction of infants, whether they be resident or non-resident, the act requires the appointment of a *guardian ad litem*. To acquire jurisdiction of adults the act requires a citation to resident heirs and a notice by publication to non-resident heirs.

It is well in construing such statutes as this to trace their history. It is seldom that you cannot find in the older States statutes similar to these regulating such matters in the younger States, and if such statutes have, in the States from which they are derived, received a judicial construction, it is generally a safe plan to adopt that construction.

The act of 1841, in this State, (Thomp. Dig., 203 and 4,) under which the proceedings were had, was taken from the act of Alabama of 1822. (Clay's Ala. Dig., 224.) Under the decisions of the Supreme Court of that State, it is held that the proceeding under this statute is *in rem*, that the jurisdiction of the court attached upon the filing of a petition in which is alleged the existence of one of the statutory grounds of sale. (41 Ala., 39; 29 ib., 542, 210; 28 ib., 215.) In a late case (41 Ala., 48) that court remarks, "the proceedings for the sale of decedents' lands are held by a long chain of decisions, not now to be questioned, to be *in rem*, and therefore the validity of the orders can never depend upon the fact that the court has acquired jurisdiction of the parties." We cannot go this far. We cannot hold that the validity of the orders under our statute can never depend upon the fact that the court has acquired jurisdiction of the parties. In the language of Mr. Justice Bronson, (1 Hill, 139,) "it is necessary that the court should acquire jurisdiction over the person to be affected by the sale. The court must, either by serving process, publishing notice, appointing a guardian, or in some other way bring the party into court, and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance." In a subsequent case in New York, (2 Comstock, 463,) the case in which this language was used, was reviewed, and in view of the very great diversity of decisions upon this subject, we quote with approbation its commentary upon the only case which the Supreme Court of the United States in 2 How., 131, cites as sustaining the broad proposition that such proceedings are *in rem*, and no notice to parties is necessary. Of this case (11 Sergt. & Rawle) the Court of Appeals of New York remark: In this case "it was held that under the peculiar and exclusive power of the orphans' court, as a court of record, established by the Constitution, an order of

sale was of the nature of a proceeding in chancery, of which the petition of the administrator was the bill, and in which, by *act of the Assembly, he is the sole party representing the estate.*" Of the case in 2 How., 131, (which has been criticized with some severity—7 Rob. Pract., 86 to 89,) the only question we see about which there can be doubt, is its construction of the statute. If the statute required no notice to give jurisdiction of the infant, none was necessary, and if it did make this requirement, then it was necessary, and there was no jurisdiction of the person. Our conclusion upon this point is that personal service of citation upon the infant was not necessary, as the statute did not require it; that the statute required the appointment of a guardian to appear and represent the infant, and if the court did this it had jurisdiction of the person. The Supreme Court of Ohio (13 Ohio State, 506,) speaking of the necessity for personal service upon the infant, says: "It is enough that a guardian, either specially appointed for the purpose or having the care and custody of the infant's person and estate, was before the court when the order was made." (See also 18 Ohio S., 368; 15 ib., 689; 7 ib. 138, 198.) In this case it is unnecessary to consider the doctrine of presumptions as applicable to courts of inferior and limited jurisdiction. All that was done here as to service of process appears affirmatively upon the record, and, as to the matter of jurisdiction, the affirmations of a judicial record are verities, and presumptions should not and cannot reach to such an extent as to give jurisdiction of the person when all that was done appears affirmatively, and what was done does not show it.

The next question which arises is, was the infant in these proceedings for the sale represented by a *guardian ad litem*? It appears from the record that F. Von Santen (who was the general guardian of the plaintiff) in the proceedings, by petition, acknowledged service of the citation for plaintiff, that he filed an answer alleging his infancy, and that in such answer he denied all the allegations of the petition, and that the court

in its action recognized him as guardian *ad litem*. In other words, he did all that the statute required, with the sanction of the court, but without any express appointment as guardian *ad litem* by the judge. This is sufficient. We find, after thorough examination of all the authorities within our reach, but two cases deciding this precise point, and they agree in the conclusion reached. In 2 Stewart, 214, the Supreme Court of Alabama declare and decide that where minors defendants have been permitted to make full defence by their general guardian, it will consider the sanction given to such mode of defence as equivalent to the formal appointment of a guardian *ad litem*. The court says that although not formally appointed guardian *ad litem*, such recognition is equivalent thereto. In Virginia, (6 Mon., 104,) where a suit against infants in chancery was defended by a guardian appointed by the county court, and his answer was received, and he made full defence and was recognized by the court, the Supreme Court held that the infants were as much bound as if their guardians had been appointed in form *ad litem* by the court of chancery. In the proceedings for the sale of this land, there was, therefore, jurisdiction of the subject matter and of the infant in the proceedings for the sale. This being the case, the matters complained of as irregularities and errors in the exercise of jurisdiction cannot be available in this action against a purchaser at the sale in the absence of fraud or for some like reason. This action is a collateral proceeding, not being in the same case and between other parties than those who were before the court in the proceedings for the sale. This action is essentially an equitable proceeding, and is equivalent to an original bill in the nature of a bill of review.

In Windham vs. Windham, 3 Chy. Reports, 12, an indirect attack was made upon a sale under the decree of a court of equity, whereupon the Lord Keeper remarked: "You blow up with gun powder the whole jurisdiction if such a purchaser is not protected."

More et ux vs. *Neil et al.*, 39 Ill., 262, was an original bill against the purchaser of an infant's interest at an administrator's sale of land. This bill, as in this case, sought to set aside the sale for want of jurisdiction as well as for errors and irregularities. The court having decided that there was jurisdiction, remarked: "This disposes of the case. Various other objections are made to the proceeding, but it is unnecessary to consider them, for at most these were but errors and cannot be urged against the title of these defendants. It is urged by the counsel for the plaintiff in error that this proceeding is not collateral. Perhaps it should not be so regarded, so far as relates to the parties to the former bill, but as to the defendants in this proceeding, whose title derived from the sale is sought to be divested, it is as purely collateral as an action of ejectment." 38 Ill., 108; 47 Ill., 290; 40 Miss., 142.

In *Letcher vs. Letcher*, 41 Ala., 39, the Supreme Court of that State, when asked to look into irregularities and errors attending a sale as against a purchaser, remarked: "We cannot assent to such a proposition. The maintenance of it would lead to consequences alike absurd and injurious. It would make a strict compliance with a large number of statutory requirements the unyielding standard of the validity of all orders of sale. Some of these requisitions pertain to matters not evidenced by the record. For example, a decree of sale would be void if the guardian *ad litem* was of kin to the administrator. One desiring to purchase at the sale would be unable to ascertain by an examination of the record and papers whether the title would be valid."

The purchaser need look no further than to see that the court has jurisdiction of the subject matter and parties. 47 Ill., 290; 11 Mass., 227; 1 Peters, 340; 2 ib., 168; 3 Ohio, 560; 4 ib., 159; 13 Ga., 10; 10 Peters, 475. In 3 Wall., 406, the Supreme Court of the United States was asked to look into the proof as to a fact in issue under the pleadings in a proceeding for a sale, the record of which was presented

in a collateral action. The court remarked that the matter did not touch the question of jurisdiction, and the action of the court was not open to consideration in a collateral matter. We have thus seen that the court had jurisdiction of the subject matter and the parties, and that there are no such irregularities in the sale as would authorize us to set it aside.

It is, however, insisted that the executor, Winter, was interested in the bid of Bowden with Miles Price, and that for this reason the sale was void. The testimony upon that question was substantially as follows: Emory, one of the commissioners, says that it was understood by him, at the time of the sale, that Miles Price and James Winter, who was the executor, were desirous of purchasing the Dell Bluff tract, that the executor could not be a bidder under his oath, and that Bowden was the purchaser for Price and Winter, and all the matters of said sale were arranged in accordance with such understanding, Col. J. P. Sanderson, the attorney for the estate, so counselling and advising. Hoeg, the other commissioner, says that it was his understanding that Miles Price and Winter bought the property. This, he says, was shortly after the sale and before the war. The understanding of the people or the common idea of a community as to who are interested in a sale cannot be accepted as a proper or legal method of establishing that fact. What may have occurred in the office of the attorney of the executor, and the understanding between the executor and his attorney, is no evidence against Price, and it does not appear that Price was at any time present. Howell states that he heard Price say that Bowden bid off the Dell Bluff tract for him (Price) and James L. Winter.

Anthony testifies that "from what Mr. Price told him, he (Price) and James L. Winter bought the Dell Bluff tract at the commissioners' sale." This is but the statement of the witness's own conclusion from his conversation with another.

His conclusions are not evidence. He should have stated what Mr. Price did say.

Teresa O. Winter, the widow of the executor, testifies that she was always under the impression that her husband and Miles Price had bought the entire Winter tract in partnership, and that in a recent conversation with Mr. Price, he told her that he and her husband had bought the tract together. It is thus seen that no witness testifies to what extent Winter was interested, and that the only testimony in the record as to this matter which is entitled to consideration is that of Anthony and of the widow of the executor. The testimony of the widow is that of an interested party.

Bowden, who bid off the land, testifies that he bid it off in his own name, but at the request of Price; that he looked to Price to make the payments; says he, "I considered the amount bid the full value of the land, and if I had not had as good a backer as Miles Price, I would not have bid that much for it. It was understood between me and him that he was to make the payments."

Miles Price testifies that he authorized Bowden to bid off the Dell Bluff tract for him; that he was responsible for the purchase money, and made the cash payment, and that he subsequently bought the interest of most of the other heirs. He nowhere testifies, however, that there was an understanding between him and the executor, or that the executor was to have an interest. It nowhere appears in the testimony to what extent Winter had an interest, and it does appear that everything that has been paid came from Price.

There is no person in the suit who represents the interests of Winter, the executor, if he had any, and, that he did have any interest, is certainly not a *very clear* conclusion from this testimony.

Admitting, however, for the purpose of disposing of this case, that he did have some unknown interest, what is the rule of equity applicable to the purchase of Price under such circumstances? It is insisted by the plaintiff that such

a sale was void and that Price acquired nothing thereby. All the earlier cases upon the subject of a purchase by a trustee of the property of a *cestui que* trust are reviewed by Chancellor Kent in the case of *Davou vs. Fanning*, 2 John Chy., 257, and the conclusion there reached is that the court should set aside such a sale, although the property brought a fair price and there is no evidence of any actual fraud, in fact the sale may be at public auction and *bona fide* for a fair price and it makes no difference. I understand the rule as expressed to embrace every relation in which there may arise a conflict between the duty which the vendor owes to the person with whom he is dealing or on whose account he is acting and his own individual interest. Such sale is not, however, absolutely void, as all the cases upon the subject where the question is raised hold that the *cestui que* trust, after a re-exposure of the property to sale, and failure to obtain a better or an equal bid, has a right to hold the trustee to his purchase, and in all cases in which the sale is set aside, the trustee is entitled to be reimbursed, his money paid, interest and improvements. 2 John Chy., 252; 20 Ohio, 503; 1 Ind., 565; 2 Black., 377; 14 Ohio State, 80; 5 John., 43. All this would be very well, perhaps, if this record established any interest in Winter and he was here represented; but it appears that Price made all the payments, so far as this proof is concerned, and we cannot see how this is applicable to his case. Price was no executor or trustee, and toward none of these parties did he occupy any fiduciary relation. In considering this question we must recollect that this principle, even as to the executor, is not a matter of absolute law. It is a rule of practice, a principle established by courts of equity with reference to persons occupying fiduciary relations. It is a *quasi* punishment of persons in such relations for permitting their interest to triumph in a transaction where their duty and interest clashed.

The whole doctrine arises from principles of public policy.

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The purpose of the rule is fully accomplished when interests thus acquired by a trustee, agent or other person occupying like relations, are not permitted to stand. It is sufficient to brand, under all circumstances, so far as such interests are concerned, such transactions as a legal fraud. So far as Price is concerned he acquired his interest in this property as a purchaser at a judicial sale under an order of a court having jurisdiction of the subject matter and of the parties. He occupied no fiduciary relation. The bid was for the full value of the land. There was no fraud in fact connected with the sale. Neither upon the grounds of public policy, nor upon any other principle obtaining in a court on equity, can we find a good reason for extending the rule to the interest of a person not clothed with any trust, when there is no fraud in fact, and when it appears affirmatively that full value was realized, and no other ground for setting the sale aside as to him exists, except the naked fact that the executor had an interest in the bid. In this case the sale was by a commissioner and for full value.

It was insisted that there was fraud in fact upon the part of Miles Price. This opinion is already too lengthy and we do not propose to state and review the testimony upon this subject. We have carefully examined the entire testimony several times, and nothing can be found to justify such a conclusion.

The remaining questions raised in this case arise out of what has transpired since the sale. At the sale, Uriah Bowden bid off what was known as the "Dell's Bluff tract" for \$6,075—\$3,000 to be paid in cash on the 1st of January, 1860, \$1,537 50-100 on the 1st of January, 1861, and \$1,537 50-100 on the 1st of January, 1862, the payments not made in cash to be secured by bond and mortgage. Two forty-acre tracts were sold to Wm. J. Hall for \$200—\$67 to be paid in cash on the 1st of January, 1860, \$61 50-100 on the 1st of January, 1861, and the balance on the 1st of January, 1862, the last two payments to be secured by

mortgage. Six hundred acres were sold to Henry Howell for \$2,300—\$1,150 to be paid in cash on January 1st, 1860, and the balance on the 1st of January, 1861, to be secured by mortgage. The sale was reported, an order passed confirming the sale and directing deeds to be made to the purchasers upon the terms stated. Bowden, who bid off the Dell's Bluff tract, did not receive a deed for the tract at the time of sale. He states that he bid off the tract in his own name, but for Miles Price; that he was familiar with the value of lands in the county and he believed that the land brought its full value; that it was understood between him and Price that Price was to make the payments and he relied on him to do it; that the commissioners did not, prior to the war, tender him a deed, nor did they, at any time, ask for a mortgage; that he received a deed for the property after the war.

C. L. Emory, the acting commissioner, testified that Miles Price paid him on the Dell's Bluff purchase \$1,528, and that he paid this amount to the executor, James L. Winter. This payment, it appears, was made in July, 1860. This sum was the amount due as cash after deducting the amount due to the wife of Miles Price from this sale and from the estate, she being a daughter of the testator and under the will entitled to a share. No deed was executed at the time of the first payment, and no mortgage was given for the other sums due. The war interrupted any further transactions between the parties, one of the commissioners for the greater portion of the time being North and the other parties South. After the war, and in 1866, the commissioner Emory having returned in December, 1865, a deed was executed by the commissioners conveying the land to Bowden, and Bowden subsequently executed a deed to Price. There was no mortgage executed by Bowden or Price for any balance due. As a reason for this, Emory, the commissioner, states that the relinquishment of all the heirs and distributees of the estate of James L. Winter or of their legal rep-

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representatives was exhibited to him before he executed the deed. It is unnecessary for the court in this case to do more than dispose of the questions raised by the plaintiff. Whatever interest others have need not be mentioned, and certainly this court cannot in their absence determine their rights. The interest which the plaintiff in this action had after the sale and confirmation and the deed, was his share of the proceeds of the sale. Price having made the cash payment to the commissioners, and having subsequently received a deed for the Dell's Bluff tract from Bowden, Bowden having before that time received a deed from the commissioners, Winter's interest did not extend beyond his share of the proceeds of this sale as well as his share of the amounts due by the other purchasers, Hall and Howell. Price insists that he had a settlement with the guardian of Winter for the amount due him on the Dell's Bluff purchase, and at the same time purchased of the guardian all of Winter's interest in the estate, including the eighty acres and the six hundred and forty acres. The guardian of Winter was authorized to receive from the executor such sums of money as was due his ward from the estate, and if that sum was paid by Price directly to the guardian, that was sufficient, so far as the ward was concerned.

In reference to the entire interest of Winter after the sale, Price insists that he paid his guardian the amount that was coming to him during his minority, and that since his majority he has had a full settlement with Winter, having paid him the amount due; that Winter, with a knowledge of the sale by the guardian and by the court, has received these sums with the knowledge that they represented his interest in the land derived from his father. If these are the facts, then it is clear that there is no case made by the plaintiff, not only against Price, but as against the other defendants also. This is denied by the plaintiff. The determination of this question involves the consideration of

the testimony. The testimony having a bearing upon this subject is as follows:

Miles Price, the defendant—I agreed with the heirs to purchase their residuary interest at an estimated value, five hundred dollars. I got Mr. Jaudon to go to the probate office and ascertain what was due each heir. They had approached me and asked me to buy them out. I then paid them all except James L. Winter and Henry Jaudon. They accepted the payments and appeared satisfied. This is also the testimony of DaCosta. In the same way I purchased the plaintiff's interest from Von Santen his guardian. I paid Von Santen in Jacksonville and Columbia county bonds and by transfer of stock in the bank of St. Johns. I paid to Von Santen, as the representative of his wife, who had an equal interest with the plaintiff, the same amount I paid him as guardian and the representative of his ward, the amount being five hundred dollars in stock and bonds. These deeds of the guardian dated July 13th, 1861, purporting to transfer the interest of his ward in the land to Price, are in evidence.

It appears from the testimony that the plaintiff, after he had attained his majority and in the year 1863, came to Florida for the purpose of looking after his interest in his father's estate, and while there took charge of at least a portion of his negro property, receipting to his guardian. After the war, and in 1871, he moved to Florida.

The plaintiff testifies, "I have never had any settlement with my guardian. I demanded a settlement with him before I came. He gave me as a reason for not settling *that there was nothing for me*, that Sherman, when he came through Orangeburg, had destroyed all his papers." Notwithstanding this statement of the guardian, he believed he owed him for money received from his father's estate for the sale and hire of property coming to him under the will. This witness states, "I applied to Mr. Von Santen at the instance of Mr. Miles Price for an order on Mr. Miles Price

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for bank stock, Mr. Price having informed me that there was some bank stock or bonds coming to me here, and if I would get an order from my guardian he would turn it over to me. *He did not tell me on what account it was coming to me, nor did I ask.* Mr. Price told me this at his residence. Mr. Price handed me some papers, some half dozen or over. He came out with a large batch of papers and put them on a bench. *I did not read them carefully. I may have glanced over some of them, but not sufficiently to get the purport of them, nor do I know their contents now.* Nobody then informed me, to my recollection, that these bonds were in payment of my share of the real estate. My impression was that there had been money long years before deposited in the bank here for me, either for the hire of slaves or the sale of perishable property. From my knowledge of the condition of the estate and the state of my accounts with my guardian, I would not have taken the bonds if I had known that they were in payment for my interest in the real estate." The following order appears in the testimony:

No. 29, KING STREET, . }
 CHARLESTON, S. C., April 18, 1871. }

Mr. Miles Price will please pay to Samuel A. Winter, Esq., the one-half of the net proceeds of the sale of the St. John's bank stock which he may have disposed of. Mr. Miles Price is hereby authorized by and with the consent of Mr. Samuel A. Winter to sell the bank stock to the best advantage he may think proper. F. VON SANTEN.

Of this order, which was sent him by his former guardian by his written request, (see his letter in Von Santen's testimony,) he says: "I recognize this as the order sent me. It was inclosed in the following letter:

"CHARLESTON, S. C., April 18, 1871.

"Mr. S. Winter, Jacksonville, Fla.:

"DEAR SIR: Your letter of the 15th inst. is to hand. You seem to be surprised that Mr. Price had \$1,000 worth of

Florida bank stock, which is our joint property. You may say that you should have had your portion long ago, but could you spare the two hundred and fifty dollars more than I could, but which Mr. Price had and laid out for us recently to make the bank stock somewhat good? I have written to Mr. Price in regard to this bank stock, which has so far been of no more benefit to me than it has been to you, and I am looking for his answer. In the meantime, I have no objection for Mr. Price to pay over to you whatever may be your portion out of the stock sold by him, and for this reason enclose you an order on him for it. *Before you left I told you that I had sent the certificate of the bank stock to Mr. Price to see what he could get for it. I thought it had been burned with my other papers in Orangeburg by Sherman until I accidentally found it last fall.* * * *

"Your brother,

F. VON SANTEN."

"I had other reasons to believe that my guardian owed me. There were three or four receipts for negro hire given to James L. Winter, not accounted for to me, and I could find no account of them in the probate court. From 1860 I have been supporting myself and have been no charge to my guardian. *Before coming back to Florida, I knew nothing of the sale of the real estate of my father. I knew nothing that had transpired about it.* Since I came to Florida, I have in no way knowingly consented, assented or approved by word or act the sale or disposition of the real estate of my father, James Winter, deceased. As soon as I ascertained the condition of affairs in relation to my father's estate, I applied to counsel for legal advice and proceeded to seek my remedy by law."

Upon cross-examination, this witness states: "I sold the negro after I became of age in 1863, but turned over the money to Von Santen. The interview between me and Mr. Price was immediately after I came back to Florida in 1871, within about ten days after. I have no recollection of reading the papers then, nor that Mr. Von Santen's name was

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signed to them. I may have read the endorsements. I did not read the papers through sufficiently to understand the purport of them. I was then thirty years old. Judge McLean examined the papers in the probate office subsequently to my receiving these bonds. I think I went there before that time. My object in going there was to examine Von Santen's accounts as my guardian. Judge McLean showed me his returns for two years, all that he had. They were for 1859 and 1860. I came to Florida on the seventh of April, 1871. I can't say whether I went out to the old homestead before I received the bonds. I know it was common repute before I received the bonds that Miles Price had possession of the Dell Bluff place and claimed title. I heard it from Mr. Jaudon and his wife and others; and I also heard by repute that Price's title was not good. I cannot swear that there was nothing said between Miles Price and myself in relation to the Dell Bluff place in our conversation. I had understood that Brooklyn and Riverside were going up (these places were upon the land formerly known as the Dell Bluff tract) and had seen buildings there before I received the bonds from Mr. Price."

The endorsements on the four papers shown by Price to Winter were as follows:

Land title, F. Von Santen, guardian, to Miles Price.

Land title, Frederick Von Santen, guardian, of Samuel A. Winter, to Miles Price.

Land title, F. Von Santen to Miles Price.

Receipt of F. Von Santen and Samuel Winter of all due and coming from James Winter's estate, deceased.

There were three deeds executed by the guardian, one purporting to convey the interest in the Dell's Bluff, one the interest in the Alachua tract, and the other his interest in the eighty-acre tract. The paper endorsed "Receipt," &c., was a certificate setting forth that Von Santen, the guardian, had transferred to Price the entire interest of his ward in the property.

The testimony of Miles Price as to this transaction is as follows: "I had a conversation with the plaintiff at my house in 1870 or 1871, in relation to the bonds in the bank of St. Johns. It was in the piazza of my house; my wife was present." Speaking of the papers above mentioned, he says: "I showed him these papers and he looked over them; and I told him there were some Jacksonville and Columbia county bonds in the hands of Mr. Bours, and if he would get an order from Mr. Von Santen I would turn them over to him. He got the order, and I turned them over to him. I had bought the plaintiff's interest from his guardian, and I wanted to explain to him how he could get his pay, now he had become of age. *I told him these bonds were for the landed interest in his father's estate.*" The witness then states the particulars attending the transfer of the bonds, which it is unnecessary to insert, as the fact of the transfer is admitted.

The wife of Mr. Miles Price, who was present, testifies as to this matter as follows: "There was a conversation at our house between Miles Price and Samuel A. Winter, in relation to some bonds. They were sitting in the piazza. Mr. Price handed Winter a paper in writing, which paper Winter read in my presence. This was soon after he came to Florida after the war." Upon cross-examination the witness says: "Winter did not read the paper aloud. My husband said: 'Here, Sam, is a paper I got from Von Santen.' I think that there were other papers handed him at the same time. I do not recollect that any one else was present except Mr. Winter, Mr. Price and myself and the children. Mr. Price told Mr. Winter that Mr. Bours had the bonds, and if he would get an order from Von Santen he would hand them over to him."

Rhoda Jane Adams, who was present, testifies as follows: "I was hired at Miles Price's at the time; was an employee of his. I saw Mr. Price give Mr. Winter some deeds, which he said was his landed property, and told him if he would

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write to his guardian for an order he would return the bonds to him." Upon cross-examination, witness says: "I don't remember Mr. Winter's reply. I can't tell whether Mr. Winter read the deeds or not. He examined them and may have read them. The way I knew they were deeds I heard Mr. Price say so."

The testimony of Von Santen, so far as it has a bearing on the transaction, was as follows: He recites the sale and consideration made by him as guardian in July, 1861, which has already been stated, and denies the receipt of any money from his ward during the war. He gives the letter of Winter to him, requesting an order for the stock and bonds, which was as follows:

"JACKSONVILLE, Fla., April 15, 1871.

"Mr. F. Von Santen, Charleston, S. C.:

"MY DEAR SIR: Since my arrival here Mr. Price informs me that there is bank stock here to the amount of one thousand dollars, half of which is mine. Not long since he took up the said stock for you, having paid \$250 for it. The situation in which I am now placed, being without any money at all, urges me to request you to send me an order on Mr. Price for my portion, which I should have had, by rights, long ago. * * * * *

"Very truly yours, S. A. WINTER."

"I replied to this letter and sent the order as desired. Samuel Winter must have known before he came to Florida since the war, and before he received the bonds, that the lands of his father's estate had been sold, and that Miles Price had purchased the Dell Bluff tract. He has heard it from me and his sister Emma, my wife, in 1861, after the sale was made. He has heard it from me and his sister Emma at various times. He was told it by his sister Martha, now Mrs. Haddock, and Mr. Daniel Howell, in the winter of 1870, at my house."

Upon cross-examination, this witness says: "I had no settlement with my ward since his majority. I considered

him indebted to me, and I thought it was so understood by both parties. I made a full return of all my transactions as guardian, and my accounts were carefully examined and approved by the probate court."

If the plaintiff knew at the time he received these bonds and stock that they represented his share in the sums due by the various purchasers of the land, and was aware of the act of his guardian in executing the deeds, then he cannot now recover a part of the land or the proceeds of sale. Defendant's statement that the plaintiff knew that the stock and bonds represented his interest in the land is corroborated by the testimony of his wife, by the witness Adams and all the attending circumstances. The account given of the matter by plaintiff is entirely unreasonable. The conclusion from his statement is that he went to the defendant's residence; that while there some papers were shown; that he was told to get an order from his former guardian, and some stock and bonds would be given him, and that during the whole time he did not ask, nor did Price tell him, what all this was about, or intimate to him on what account and in what manner he was entitled to these moneys. The plaintiff says that Price did not tell him on what account the sum was due him, nor did he ask him. Winter was at the time thirty years of age, and a man, as his own testimony shows, of business experience. It is not probable that he would expect Price to be making him a present, nor did he have any reason to suppose that Price owed him anything except as the purchaser of this land; and this he knew, as he states that he knew that Price was in possession, claiming title; and Von Santen states that Winter was frequently told of Price's purchase by himself and by his (Winter's) sisters. In his letter to Von Santen he seems to have had some knowledge of the matter. He knows something as to the respective interests of his guardian and himself in this stock, and his language implies knowledge of at least the date to which he became entitled to his portion, as he says

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he should have had it by rights long ago. Mrs. Price testifies that plaintiff read the paper handed him by Price; and the witness, Adams, states that he examined the deeds. The plaintiff does not deny reading the deeds, but says: "I may have glanced over some of them, but not sufficiently to get the purport of them." He says, upon cross-examination: "I may have read the endorsements." The endorsements are in a large, plain hand, and it was impossible for him to have read them without knowing that they were instruments of writing from his guardian to the defendant. One of the papers read by him was very brief, was written in a very plain hand, and was as follows:

"STATE OF FLORIDA, }
 "COUNTY OF DUVAL. }

"Be it known to all whom it may concern, that I have this day sold to Miles Price all my right, title, claim and interest as an heir of James Winter, deceased, to the assets of said estate, and also, I have, as guardian of Samuel A. Winter, minor, sold him like claim and interest of said estate to Miles Price.

F. VON SANTEN.

"Witness: Wm. Jaudon, A. W. DaCosta."

In his cross-examination he says: "I cannot swear that there was nothing said between Miles Price and myself in relation to the Dell's Bluff place in our conversation. I knew that Miles Price was in possession and claimed title, and I had heard that his title was not good." He intimates in his testimony that he thought his guardian owed him, and the connection in which it is stated leaves it to be inferred that he thought the stock was upon this account, while in another part of his testimony he admits that his former guardian had told him that he owed him nothing; and his guardian swears that such was the understanding between them. This would seem to be probable, as eight years had passed since his majority, and no action had ever been taken by him against his guardian. In no event would

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the plaintiff have been entitled to compensation for the increased value of these lands. His right after the sale was limited to the proceeds. The purchasers were entitled to deeds upon making the cash payment. His share of them he and his guardian have received, knowing that what he received represented his interest. If this is not a full settlement, which we think it is, Winter is now certainly estopped from demanding the lands. The cases upon the subject are certainly as strong, if not stronger, than this. (7 S. M., 409; 4 Ind., 259; 26 Ala., 452; 2 Rich., 153; 19 Ill., 298; 53 Pen. State, 352; 1 Rawle, 163; 7 W & S., 127; 7 Harr., 424; 1 Casey, 282.) With this conclusion a court of equity must regard Price as the owner of all the interest of the plaintiff in the landed estate of his father, and for that reason there can be no equity in favor of the plaintiff against defendants Hall and Howell, the other purchasers at the sale.

This disposes of all the questions in the case. Judgment reversed.

The judgment of the Circuit Court should have been for the defendants, and the case is remanded with instructions to enter such judgment.

REBECCA P. RAIN, APPELLANT, VS. JAMES H. ROPER, AP-
PELLEE.

1. Where an unmarried man makes a contract to sell real estate, and to execute a deed on payment of the purchase money, and afterwards marries and dies before executing a deed, the right of dower of the widow depends upon the compliance by the purchaser with the terms of the contract.
2. If the purchaser in such case pays for the land, he is entitled to a conveyance free of the claim of dower, and he may proceed against the heirs and legal representatives and compel a conveyance.

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3. If he fail to comply, the representatives may proceed to compel a specific performance, or for a rescision of the contract. If it be rescinded, the widow will be entitled to dower.
4. The purchaser cannot enjoin the widow's application for admeasurement of dower without showing that he is entitled to a conveyance, and for the purpose of procuring an injunction and compelling a conveyance, the heirs and legal representatives are necessary parties.

Appeal from the Circuit Court for Alachua county, Fifth Judicial District.

The appellant was the widow of Cornelius Rain, and as such applied to the Circuit Court by bill in equity for an assignment of dower in certain lands described. Appellee then commenced this suit by bill to restrain her from seeking dower in the lands, because he had bargained with said Cornelius Rain for his interest in the lands and held his bond for title thereto, to be consummated on payment to Rain of the sum of \$2,200, on or before the first day of January, 1867. That the bond was executed and appellee went into possession thereunder before the marriage of appellant with said Rain; that after the marriage he paid the said purchase money to Rain, and Rain died without having executed a deed to appellee. Prior to the execution of the bond, Rain and the appellee owed equal interests in the land, an undivided half having been sold and conveyed to Rain by the appellee some months previous. The appellee claims by his bill that Mrs. Rain was not entitled to dower because of his purchase and payment, the purchase and the bond to convey having occurred before the marriage, and because the appellee and Rain, the husband, were the owners and held the lands "as partners or tenants in common" prior to and at the time of the execution of the bond.

The answer of the appellant admits the facts charged in the bill, except that it denies that Rain parted with the title or actual possession of his interest in the land, denies that appellee paid the \$2,200 consideration, and denies that the land was held as partnership property. The sale and the

execution of the bond for title are expressly admitted, as charged.

The case was heard according to the record upon bill, answer and replication, and the court decreed that appellant was not entitled to dower, and gave a perpetual injunction against any proceeding on her part to obtain dower in the lands described.

T. F. King for Appellant.

Dawkins & Taylor for Appellee.

RANDALL, C. J., delivered the opinion of the court.

The appellant insists that the bill is insufficient to maintain the suit, that the decree was erroneous because C. Rain, deceased, "died seized and possessed of the lands," and because the bond for title was not introduced in evidence.

The act of November 7, 1828, (Thomp. Dig., 184,) provides that the widow shall be endowed of one-third part during her natural life, of all the lands, tenements, &c., "of which her husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower."

"As a general principle," says Chancellor Kent, (4 Comm., 50,) "it may be observed that the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin. An agreement by the husband to convey before dower attaches, will, if enforced in equity, extinguish the claim to dower."

Upon this principle, if a man make a contract for the sale of his land, and afterwards, and before conveyance, marry, he is regarded in equity as a trustee for the purchaser, and if the conveyance be made during the coverture in execution of the contract, the purchaser takes the estate discharged of dower. And the rule is the same if the husband die without having conveyed the land, and a specific performance of the contract is enforced against the heirs. Roper Husb. and

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Wife, 358; *Dean vs. Mitchell*, 4 J.J. Mar. 451; *Stevens vs. Smith*, *ib.*, 64; *Oldham vs. Sale*, 1 B. Mon., 76; 7 Md., 26; 3 Md. Chy., 359; 3 Gill and John., 398; *Atkins vs. Holmes*, 2 Carter, (Ind.,) 197; *Kentner vs. McRae*, *ib.*, 453.

Of course a widow cannot have dower in a trust estate where the mere legal title is in the husband. And it is equally plain that where the estate of the husband is defeasible, or is subject to conditions and qualifications imposed before marriage and without fraud, the same circumstances will affect the right of dower after his death.

It would be a very inequitable and dangerous rule that a vendor, before marriage, making a valid contract to convey upon payment of the purchase money, could by marriage impair the contract he had made by encumbering the estate with a right of dower.

The title of Rain, after the contract with Roper, was such that a court of equity would have directed Rain to execute a conveyance upon Roper's compliance with the contract. And assuredly the court would not have permitted Rain's marriage and his wife's refusal to join in the deed to stand in the way of a decree of a perfect title according to the agreement. And had Rain, after marriage, executed a deed in pursuance of the agreement, he had done just what the court would have directed. The estate of which Rain was seized during coverture, in this land, was an estate qualified and encumbered by the contract, and hence the right of dower was subject to such qualification and incumbrance. See *Green vs. Green*, 1 Ohio R., 535; *Derush vs. Brown*, 8 *ib.*, 412.

It was doubtless in view of these equitable principles that the court decreed in the case at bar that Mrs. Rain was not entitled to dower in the lands bargained.

The record before this court, however, does not disclose that any testimony was taken or that any facts were admitted upon the hearing before the Circuit Court. The brief and argument of the appellee assert that the facts alleged

in the bill and denied by the answer, were proved before the court and to its satisfaction. Looking at the decree itself, we find that the cause was heard upon the bill, answer and replication and the arguments of counsel. The bond for title was admitted by the pleadings, but the possession of the lands and the payment of the money are disputed by the answer; and without some evidence to satisfy the court that the purchaser had complied with the terms of the contract, how can it be contended that he has entitled himself to a decree for a perpetual injunction?

In the case of the sale of lands before marriage, if the vendee neglect to make payment, and the vendor, during his lifetime, or his representatives after his death, elect to rescind the contract instead of going for a specific performance, the beneficial interest of the vendor in the lands will revert in him in the one case or in his heirs in the other, and his wife, consequently, be entitled to dower. (*Kinter vs. McRae*, 2 Carter, 453; *Dean's heirs vs. Mitchell's heirs*, 4 J. J. Mar., 451; *Scribner on Dower*, chap. 28, §§ 15, 21.

In the absence of any evidence that the vendee has complied with the conditions of his contract of purchase, we cannot admit that he has any right to stand in the way of the widow's legal right of dower. He must be entitled to a specific execution of the contract by compliance, or he will have no standing at law or in equity. He asserts that he has paid the purchase money and the widow denies it; so we have no evidence to sustain the complainant. His case is not proved, even as stated in his bill.

The widow is entitled to dower in the real, and a certain share of the personal property. If the real estate has been bargained away before her right of dower attached, and the purchaser complies with the contract, her dower cannot attach, because the vendor has then no beneficial interest, but holds the title as a mere trustee for the purchaser, and the widow can have her share of the proceeds. She is entitled to one or the other, but cannot have both, nor can she be

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deprived of both by the purchaser's non-fulfilment of his contract.

The case of Smith and wife vs. Hines, 10 Fla., 259, referred to by the appellant, concerns personal and not real property.

In what manner, then, can the purchaser establish his rights as against the claim for dower? The real issue in this case is whether the purchaser is *entitled to a conveyance* in pursuance of the contract. The widow is entitled to a dower of the lands of which the husband was "seized and possessed" during coverture, unless his seisin be defeated. The husband, in case of the non-payment of the purchase money, could have held the property as against the purchaser, and the purchaser could have recovered the land from the husband only by compliance and a suit in equity to compel a conveyance. And now that the husband is dead, the purchaser must establish his title by compliance, and by a proceeding against the legal representatives for the same purpose.

The legal seisin and possession are in the heirs. The widow is thus entitled to dower unless this seisin be defeated by a conveyance enforced in a court of equity, as we have already seen. As is said by Chancellor Kent, "the wife's dower is *liable to be defeated*" by the subsisting claim. "An agreement by the husband to convey before dower attaches, will, *if enforced in equity*, extinguish the claim to dower."

The rule is the same if the husband die without having conveyed the land, *and a specific performance of the contract is enforced against* the heirs. (Adkins vs. Holmes, and Kintner vs. McRae, 2 Carter, 197, 453, before cited.)

In all the cases we have been able to examine, the dower was defeated by a conveyance by the husband in his life time, or by a decree of specific performance against the heirs.

The issue, as to the payment, is legitimately between the purchaser and the heirs and legal representatives, and not

merely between the purchaser and the widow. It is between the purchaser and the heirs and representatives, because it would have been between the purchaser and the husband, if he were living, and this only in a suit for the purchase money or by a proceeding to rescind or to enforce the contract and to compel a specific performance. This is, in our judgment, the result from the adjudicated cases and upon all equitable principles. The cases cited by the appellee sustain this position.

It is true that the assignment of dower in the lands covered by the contract would be liable to be defeated by a subsequent proceeding to compel a conveyance, and this would be to the disadvantage of the widow. It would be far better on her part to postpone the application for dower until the contract is rescinded, or until the result of a suit for specific performance. But that affects her only, and does not concern the purchaser, as his rights are not affected by her application in a proceeding to which he is not a party.

The purchaser's title must grow out of his equitable rights under his contract. The legal title remains in the heirs of the vendor until divested by a court having jurisdiction, upon a proper case made to transfer the title by its decree.

The claim of the complainant, that the widow is not entitled to dower, on the ground that the lands were held in joint tenancy as partnership property, cannot be sustained upon the facts stated. It is not alleged that the lands were purchased with partnership funds for partnership purposes. (See *Loubat vs. Nourse*, 5 Fla., 351; *Robertson vs. Baker*, 11 Fla., 192; *Price and wife vs. Hicks*, 14 Fla., 565.)

A proper order of this court would be that the bill of complaint be dismissed, but under the circumstances it is ordered that the decree of the Circuit Court be and the same is hereby reversed, and the cause remanded with directions that the complainant, appellee, be allowed to amend his bill by adding the necessary parties and making the necessary

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allegations and prayer for relief in accordance with the opinion in this case within a certain time, to be fixed by the Circuit Court, in default of which the bill will be dismissed.

EDMOND HILL, APPELLANT, vs. JACOB VANDERPOOL, RESPONDENT.

A certificate of sale of lands sold by the United States Direct Tax Commissioners, under the act of Congress of June 7, 1862, for unpaid taxes charged thereon, signed by two of the tax commissioners, is admissible in evidence in an action brought to try the title to the land.

Appeal from the Circuit Court for St. John's county, Fourth Judicial District.

The opinion of the court contains a statement of the case.

H. Bisbee, Jr., for Appellant.

W. H. Robinson for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This was an action of ejectment to recover certain lands in St. John's county, of which the defendant (appellant) was in possession, and of which plaintiff claimed title by virtue of certain mesne conveyances and former possession by his grantors and their ancestors.

The defendant in possession claims by his answer that the lands were sold by the United States Direct Tax Commissioners for the unpaid direct tax due the United States in December, 1863, to James W. Allen, and that Allen conveyed the same to defendant, who was in possession under said tax sale and conveyance prior to the making of the deed under which the plaintiff claims.

In the trial the plaintiff proved his title to the land by several conveyances.

The defendant then offered in evidence a certificate of sale by the United States Tax Commissioners for Florida of the premises in question, (the certificate being signed by two only of the three commissioners,) to James W. Allen. The court refused to admit the certificate in evidence on the ground that it was signed by two commissioners only, and that it was invalid without the signatures of three commissioners.

The jury then, under the charge of the court, rendered a verdict for the plaintiff, and judgment was rendered accordingly, and the defendant appealed.

The Supreme Court of the United States, in *Cooley vs. O'Connor*, 12 Wallace, 391, held that a certificate signed by only two of the direct tax commissioners appointed under the act of Congress of June 7, 1862, that land charged with the tax had been sold, is admissible in evidence in an action brought to try the title to the land. "The commissioners were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number." "Had the certificate been admitted, it would, by force of the statute, have amounted to *prima facie* evidence, as well of the regularity and validity of the sale, as of the title of the purchasers."

This settles the question raised in this case. The Supreme Court of the United States having given an interpretation of the act of Congress, we are bound to follow it.

The certificate should have been received in evidence, notwithstanding the objection made, and the defendant permitted to show his title derived from the tax sale purchaser. It would then have cast upon the plaintiff the burthen of impeaching the sale or showing that the property had been redeemed from the sale as provided by the act of Congress.

The verdict and the judgment are hereby reversed, with costs, and a trial *de novo* ordered.

Nalle & Co. v. Lively et al.

EDWARD NALLE & CO., APPELLANTS, VS. MATTHEW LIVELY,
ET AL., APPELLEES.

A relinquishment of dower by a wife for the benefit of her husband is a sufficient consideration for a subsequent settlement upon her by him; and such settlement is not fraudulent as to creditors of the husband if the relinquishment was obtained upon an express agreement with her that the settlement should be made, and the property settled upon her is a fair equivalent for the dower released.

Appeal from the Leon Circuit Court, Second Judicial District.

The opinion of the court contains a statement of the case.

R. B. Hilton for Appellants.

1. The deed from Hayward to the trustees of his wife can be of no possible validity under the statutes of Florida until September, 1865. There is no evidence outside of the admission of the attorneys that it was signed by him until that day, while the evidence is positive, indeed it is admitted on the other side that it was not until that day witnessed or recorded.

"No estate or interest of freehold, or of a term of years of more than two years, * * * shall be created * * * in any other manner than by deed in writing, sealed and delivered in the presence of at least two witnesses. Bush's Dig., 148.

"All grants, conveyances or assignments of trust or confidence of or in any lands, * * * shall be by deed sealed and delivered in the presence of two witnesses, * * * * * or else the same shall be void and of none effect. Ib., 149.

"No conveyance, transfer or mortgage of real property or of any interest therein. * * * shall be good or effectual in law or in equity against creditors, * * * unless the same shall be recorded in the office assigned by law for that purpose." Ib., 151.

"It is perfectly clear," say the Supreme Court of the United States in *Clark vs. Graham*, 8 Wheat, 577, "that no title to lands can be acquired or passed unless in accordance with the law of the State in which they are situated, and the laws of Ohio requiring the execution of deeds in the presence of two witnesses; a deed executed in the presence of one is void." 21 Mich., 24.

It is impossible to believe, with the admission before us of Hayward's sagacity and extensive dealings in buying and selling, that he ever *attempted* the execution of the settlement until in 1865, when, finding himself insolvent, it became desirable to secure a portion of his estate for the benefit of his wife, and of course for his own benefit.

2. It is admitted that at the time the conveyance of Hayward for the use of his wife became a deed, to-wit, in September, 1865, Hawyard was insolvent, and that the appellants were his creditors. Nor will it be denied that, being so insolvent, he could not then make a voluntary conveyance to his wife valid as against his creditors.

But it is attempted to establish as a valid consideration for the settlement, the relinquishment by Mrs. H. twenty-one years previously of her contingent or inchoate right of dower to certain lands then sold by her husband. In other words, after said relinquishment the husband goes on for twenty-one years buying and selling, trading and trafficking, the community and the public, meanwhile, never having heard a hint or intimation of any claim of his wife to any settlement on the score of her relinquishment, and then finding himself an insolvent man and she the wife of an insolvent husband, an old draft of a conveyance is hunted up, executed and placed upon record.

3. The deed from Hayward to his wife was, under the circumstances, fraudulent on the part of both, irrespective of any consideration upon which it can be claimed to rest. Under the statute of 13 Elizabeth, re-enacted in this State, a conveyance to defeat the right of creditors must be not only

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upon a "good"—which is meant in this statute a *valuable* consideration—but it must be executed *bona fide* and received *bona fide*. 3 Coke, 80; 1 Smith's L. C., 33; 2 Johns-Chy., 48; 11 S. and M., 470; 1 Story's E., § 369; 4 Md., 87; Rice, (S. C.,) 389; 1 Leading Am. Cases, 72; 13 Wis., 460; 19 Texas, 529; 6 Barr, 239; 3 Md. Chy., 349.

"It is not sufficient that a conveyance be upon good consideration or *bona fide*. It must be upon both. And therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors." Story E., § 353.

A deed not fraudulent at first may afterwards become so by being concealed or not pursued, by means of which creditors have been drawn in to lend their money. 2 Vernon, 251; 2 Johns. Chy., 48; 3 ib., 508.

But proof that a full consideration for the property sold was paid, does not decisively negative the presumption of fraud, for the intention of parties, and not the fact of payment, is the test by which the transaction is to be judged. And a transfer of property with an intent to defraud or defeat creditors will be void, although there may be in the strictest sense a valuable and adequate consideration. 1 Bond, 175; U. S. Dig., Vol. 3, N. S., 305.

So that had this settlement been regularly executed in 1850, when it bears date, with all the requisite forms, the claim of Mrs. Hayward to the lots in 1865 would have been fraudulent even outside of the recording acts. The paper was kept during the whole intermediate time back from the public, in the possession of Hayward or his wife; the trustees did nothing under it, not even receiving it into their possession; taking no steps to record it or otherwise acquaint the public with its existence; Hayward remaining all the while, as before, in the possession of the property and dealing with it as his own.

Can a parol promise from a husband to his wife, either before or after marriage, proved by no other testimony than

that of the wife, sustain a settlement of the husband's property upon the wife not executed until he had become indebted to insolvency, even though that promise was based upon a valuable consideration? I utterly deny the proposition. 3 Johns. Chy., 481; De., G. and J., 76; 2 McCord Chy., 274.

"It is not denied that the husband may make a valid settlement upon his wife in consideration of a portion coming to her agreed to be paid to him, or of her relinquishing any interest in his property, even though that interest be contingent or inchoate, as the right of dower, for instance. But to support such a settlement against creditors whose debts accrued prior to it, the court will require every reasonable proof that the portion was paid or the relinquishment made in consideration of the making of the settlement." Atherly on Marriage Settlements, top p. 83; 2 Lev., 70; 2 Lomax Dig., 333, 334.

In cases of such post nuptial settlements, says Judge Lomax, Vol. 2, p. 334: "If much time has elapsed between the alleged contract and the settlement, there must be clear proof to establish the contract. The recitals of the contract in the settlement are not evidence to support the same against creditors seeking to impeach it."

"The recitals in the deed of settlement are not such proof as the law requires." See note of Chancellor Kent to Read vs. Livingston, 3 Johns. Chy., 507.

Recitals in a post-nuptial settlement, though admissible against the persons claiming under the settler, are not evidence against a creditor by whom the deed is assailed. 12 Grat., 384, 6; 8 ib., 150.

And as to recitals generally: 3 Johns. Chy., 481, 488; Riley's Chy., 236, 219; 1 Iredell, 97, 103; 3 Littell, 427; 12 N. H., 248; 28 Pa., 419; 10 Ala., 137; 16 ib., 725; 5 Rich. E., 335.

"A conveyance for the benefit of a wife in consideration

of dower previously released by her is voluntary as to existing creditors." 19 Mo., 341.

In *Lyne vs. Bank of Kentucky*, 5 J. J. Mar., 545, the court ask: "Can the reception of an estate by the husband in right of his wife constitute a valuable consideration to support a settlement on the wife years thereafter, when there was no ante-nuptial contract and no agreement to make a settlement previous to reducing the wife's property to possession? We think not. If it could be, there are but few married men who could not, when a change of fortune in after life might suggest the propriety of making family settlements for a valuable consideration in attendance upon which to make ample provisions for the support and maintenance of their wives and children and by consequence of themselves, at the cost and suffering of creditors and their wives and children." See 28 Ala., 442; *Rice Chy.*, 401.

In order to support a conveyance to the wife by the husband on the ground of a previous application of her separate property to his use, it must appear that the advances were made by her on the faith of the anticipated settlement. 3 Eds. Chy., 58; 8 Paige, 161.

What is the presumption when the wife joins her husband in the conveyance of his lands? It is that she does so without compensation. 2 Bush, (Ky.,) 543.

In *Hatch vs. Gray*, 21 Iowa, 29, the husband collected and received a portion of his wife's inheritance, promising to pay it back to her, with interest. Afterwards he became indebted, and while so paid a part of the money to his wife, which she invested in land, taking the title in her own name. Her title was made to yield to the claims of his creditors, the court saying, "a secret parol agreement between husband and wife will not be supported against creditors whose rights have intervened in ignorance of such agreement."

Rucker vs. Abell, 8 B. Munroe, 568, was the case of a father—who, while free from debt, gave land to his son by parol, the son going into possession and making valuable improve—

ments. The father, after becoming indebted, executed a deed, which was held void as to his creditors. 3 Dana, 503; 7 Bush, 337; 2 ib., 536.

Let us notice some of the cases in which the wife's relinquishment has been held a sufficient consideration for a conveyance or settlement.

In Ward vs. Crotty, 4 Met., (Ky.,) 59, the wife refused to relinquish her dower interest unless she should receive one of the notes given in payment of the land sold. This note was given to her; she thereupon relinquished her dower; her claim to the note was sustained.

In Hallowell vs. Simonson, the wife in her answer asserted that she refused to relinquish dower in land sold by her husband worth \$3,000, unless certain land should be purchased for her, which was done at the price of \$1,200, that she would not have released her dower but for the agreement made in good faith that the property purchased should be her's. See 5 B. Mun., 298; 2 Bush, (supra,) 535.

The case of William and Mary College vs. Powell, 12 Grat., 384, is one in which the wife's claim was sustained; but under what circumstances? There were the contemporaneous deeds to speak for themselves. As the court say, "*res ipsa loquitur*."

But what was the decision of the same court in Lewis vs. Caperton, 8 Grat., 148, where the attempt was made to establish the validity of a settlement upon a wife on a recited consideration of the previous relinquishment of her inchoate dower right in the husband's property, with a promise, proved by her testimony and that of others, at the time of her relinquishment, on the part of the husband, to make a settlement? The court held that her claim must yield to that of her husband's creditors. 11 Leigh, 476, (cited in 12 U.S. Chy. Dig., p. 550,) is the following case: "In consideration of his wife's agreement to release her dower in certain land, a husband settles land upon her, and after a *fi. fa.* sued out on a judgment recovered against the husband subsequently

to the settlement, she joins him in a deed of land for the purpose of releasing her dower in pursuance of her agreement: Held, that the lands settled on the wife were subject to the execution, and that equity would not restrain the creditor from making his debt out of them." 2 Bush, 535.

In the case of Wicks vs. Clark, *supra*, (8 Paige, 166,) the court distinguish between "a post-nuptial settlement of the wife's property from the ordinary case of a husband making a settlement of his own property, or property which he possesses in his own right, upon his family under similar circumstances. "In such cases," says the chancellor, "there should be the most rigid scrutiny, and the fairness and honesty of the transaction must appear in the clearest light, to induce the court to sustain it." How will the case now before this court stand when thus tested? And he goes on to lay down the rule by which the validity of these settlements may generally be determined: "And I think it may be assumed as a rule that the same circumstances which would induce the court to compel a settlement by the husband will operate to uphold a deed settlement already made to the same extent that would be required if one should be directed to be made under the view of the court." See 1 L. E. Cases, p. 388.

Let us suppose, then, the case reversed, and that Mrs. Hayward were now before the court asking, after twenty years, the specific performance of the alleged promise of her husband to make a settlement in consideration of the relinquishment of her contingent right of dower in the lands conveyed by him, and that he and these complainants as his creditors were defendants in the suit.

The very fact that she has instituted such a suit (and I admit that a court of chancery would have jurisdiction in such case,) would be an answer to her allegation of coverture as a defence against a plea of the statute of limitations. But not only would such a suit be barred four times over by the statute of limitations; the staleness of the claim and the presumption of its satisfaction would be conclusive

against it, even as regards the husband, to say nothing of creditors.

"Every presumption that fairly can be made shall be made against a stale demand. The very forbearance to make the demand affords the presumption either that the claimant was conscious that it had been satisfied or intended to release it." Story's E., Sec. 1520; 2 Vesey, 380.

To the same effect are the decisions of all the courts; not one announcing the doctrine with more emphasis than that august tribunal, the Supreme Court of the United States. 8 How., 210; 1 ib., 169.

What answer, in such a suit, would she make to the defence of the statute of frauds?

The facts of the following case of Pryor vs. Smith, 4 Bush Ky., are set forth with sufficient distinctness in the U. S. Dig. for 1869, p. 342: S. sold and conveyed to D. a tract of land, and as a past consideration of the conveyance, D. and his wife conveyed to S. a tract of land which D's wife owned by inheritance from her deceased father. The wife at the time objected to conveying her title, except upon the consideration that she should be secured in the tract conveyed to her husband, but united in the conveyance upon a verbal agreement with him that he would so indemnify her, and under advice that the deed of her husband would vest the land in him in trust for her to the extent of the value of her land: Held, that equity would not decree to the wife an equitable provision out of the land as against the creditors of her husband.

If authorities be needed to show the necessity of recording conveyances of property settled on the wife in advance of the husband's insolvency, I cite among others the following: 1 Grat., 345; 5 J. J. Mar.; 1 Des., 401; 2 ib., 266; 3 ib., 223; Rice Chy., 389; McMullen, 373; Riley's Chy., 230; 22 Texas, 480; Iredell R., (1845,) 518.

But it may be urged that the answers of Mrs. Hayward and Austin established the validity of the consideration for

the settlement. I ask to be referred to a single case in which similar answers to such a bill as this have been held to accomplish such a result.

The court will observe that as to the property conveyed to Mrs. Hayward this is not a bill of discovery. She is not asked to disclose the consideration upon which her claim to the property rests. That consideration is shown by the deed itself, viz.: Past relinquishment of dower, together with natural affection and the formal and nominal consideration of five dollars. The complainants were willing to rest their claim upon the inadequacy of these considerations. Mrs. Hayward, in her answer, comes forward with a new and altogether different consideration, viz.: The *promise* of her husband. Must she not prove that her answer is in response to nothing in the bill and to none of the interrogatories appended thereto?

It is admitted that in appropriate cases where the denials of the answer are responsive to the allegations and interrogatories of the bill, they must be taken as true, unless shown to be false by more than the oath of one witness, (2 L. E. C. p. 11, p. 87,) "on the obvious principle that when the plaintiff has chosen to interrogate the conscience of the defendant, he is not entitled to select those responses which make in his favor, and reject the rest." But "the rights of the defendant in chancery to have his answer taken as evidence is co-extensive with his obligation to answer." 15 Ver., 93.

In the present case the complainants did not choose to interrogate the conscience of Mrs. Hayward as to the point in issue.

The trust deed itself and its own terms, in connection with the admitted facts, prove and establish the complainants' case. The defendant, Mrs. H., attempts to set up something outside of and in addition to the terms of the deed, in avoidance of the charges of the bill, and this something she must prove.

But even were it otherwise, the language of the deed,

with the attendant circumstances, is more than the evidence of two or even than twenty witnesses to establish the fraudulent character of the transactions.

The contract or agreement set up in the answer is alleged to have been entered into between Hayward and his wife, by parol, in 1844; there were no trustees and no witnesses. Now granting, for the sake of argument, that the wife may by herself, during coverture, contract with the husband for his property, what is the kind of evidence required to support such a contract? One of the most respectable tribunals in the land, the Supreme Court of Pennsylvania, has told us, speaking through one of the ablest jurists of any land or any age, Judge Gibson. Referring to the proof furnished by the husband's admissions to establish such a right in the wife, he says: "It is not to be concealed, however, that as a medium of proof such admissions are to be scanned with extreme vigilance, and that to prevent the consequences of misapprehension or mistakes on the part of witnesses, it is necessary that they be deliberate, positive, precise, clear and consistent with each other, not inconsiderate, vague or discrepant, and the testimony to establish them ought to be full, satisfactory and given by impartial witnesses; (1 Barr, 329.) reiterated by the same court in 23 Pa., 460, and in 31 Pa., 450. And such is the rule even where the rights of the creditors are not involved. See also 18 Texas, 21; 22 ib., 480.

As to effect of answer in cases of fraudulent conveyances see 23 How., 476, and 13 Wis., 283.

But it is insisted that the answers of Mrs. Hayward and Austin deny all fraud. Granted. But in doing so they deny no fact; they simply deny a conclusion of the law. It has been repeatedly held that deeds may be fraudulent, even where the parties intended no fraud. Say the Supreme Court of Missouri, in Patter vs. McDowell, (31 Mo., 62,) which was conveyance from husband for his wife, "deeds

may be fraudulent in law as against creditors, even where the parties intend no fraud."

Or it may urged that even if fraud on the part of Hayward, there is nothing to connect his wife with it. The answer, in the language of the Supreme Court of Texas, (in *Castro vs. Illies*, 22 Texas, 480,) is: "When the wife is the beneficiary of the deed of conveyance from her husband, which is impeached by his creditors for fraud from the relations of the parties, it is scarcely to be supposed that the circumstances and intentions of the grantor were unknown to her."

But the conclusion, from the recitals in Hayward's deed to his wife, so full and exhaustive, and yet silent on any promise at the time of the relinquishment of her dower that her husband would compensate her by a settlement, is irresistible that there was no promise then made by him, and acted upon by her, to the effect set forth in her answer.

See these recitals set forth below.

"It has been held quite generally," says Professor Parsons, (1 *Contracts*, 429,) "that when the consideration is expressed in a written contract, no other can be proved, unless there are words which indicate other considerations, because this would be an alteration of the contract by evidence *aliunde*. The same rule is said to be applied in equity unless relief is sought against the instrument on the ground of fraud or mistake."

In the case of *Haney vs. Nugent*, 13 Wis., 283, a deed from father to daughter, though the consideration was proved by the answer of both, was set aside as fraudulent.

The manner in which H. and wife dealt with the trust property in mortgaging it for his debt, in violation of the express terms of the deed, shows that they regarded it as a nullity.

2. As regards Lively's title, the ground taken by him is in effect that the conveyance to Mrs. Hayward was valid and by consequence as to him was valid; but that even, if

her's was invalid for fraud, yet that he being a *bona fide* purchaser without notice, his deed must, in any event, be held good. On the contrary, complainants hold that the deed to Mrs. Hayward was void as to Hayward's creditors, and Lively knowing of Hayward's insolvency when the deed to Mrs. Hayward was recorded, and when he took his own, is not an innocent purchaser; but that be this as it may, Mrs. Hayward was only tenant for life, with power of appointment by will, or in some other manner, only to take "effect after her decease," consequently she could not convey the property by deed *inter vivos*; and that Lively's title, failing on this ground, if no other, the property falls back to Hayward's estate, and should be applied towards the payment of his debts.

Of what had Lively notice?

First, that Mrs. Hayward's pretended title was by deed which, though dated on April 15th, 1850, was not recorded, nor proved for record until September, 1865, when the grantor was overwhelmed with debt.

Second. He had notice on the face of her deed that she held by a voluntary conveyance, recorded as above stated, when her husband was insolvent, and fifteen years after its date.

Were not these facts sufficient to put him upon inquiry, and cause him to withhold his hand from participation in this series of alienations by which Richard Hayward's property was sought to be placed beyond the reach of his creditors?

"Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as notice." Am. notes to *LeNeve vs. LeNeve*, 2 L. E. Cases, 116, and cases there cited. Again. Nothing is better established than that the purchaser will have constructive notice of everything that appears on any part of the deed or instruments which prove and constitute the title purchased. *Idem*. p. 120.

"Such notice, therefore, is of the most conclusive character, and is insusceptible of being explained away or rebutted;" (*Idem.*, same page,) and "will overrule a positive denial of notice in the answer itself." *Idem.*

On the face of the deed from H. to his wife, it was executed for a past consideration, and merely in reciprocation of previous kindness on her part. It shows no promise made at the time she relinquished her dower to compensate her therefor; on the contrary its amplification of recitals, none of them setting forth such a promise, is conclusively negatively pregnant that there was no such promise made and received at the time as the consideration for such relinquishment.

The title of Mrs. Hayward was only a life estate, with power of appointment by will or other instrument, to take effect after her death. The exact language is "upon trust for the only use, benefit and behoof of H. W. H., wife of the said party of the first part, during and for the term of her natural life, and to such further use as the said H. W. H. may, by her last will and testament or in any other manner appoint, to take effect after her decease."

"The distinction is, perhaps, slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will, but that distinction is established and in the latter case the property vests." 13 Vesey, 453.

"A gift of personal estate to the wife for life, with a direction that after her death one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life with power of appointment." 4 Rus., 263; 9 Sim., 161; 13 Vesey, 444.

The power vested in Mrs. Hayward could only be executed by a paper in its nature testamentary. Under the common law, certainly under 34 and 35 Henry 8, a married woman could not make a valid will of lands, that statute expressly prohibiting her. 1 Jar. on Wills, 30. And it is extremely doubtful whether in Florida she could have done

it in 1850. (perhaps it is not certain even now that she has the power,) for though our statute of wills, Thomp. Dig, 192, says, "every person of the age of twenty-one years, being of sound mind, shall have power by last will and testament to dispose of his or her lands," yet this language is no broader than that in 32 Henry 8, authorizing every person having lands, &c., to devise them, and under that statute, says Jarman *supra*, "it seems to have been the better opinion that a married woman could not make a valid will of lands."

But it seems to have been held always, that though a married woman could not devise her lands without the assent of her husband, she might, when holding a life estate therein, with power of disposal to take effect after her death, make a valid execution of that power by an instrument in writing, testamentary in its character, whether technically a will or not. 3 Johns. Ch., 523; 6 J. J. Marsh., 573; 4. Kent Com., 506; 1 Red. on W., 28, 29.

And though a married woman, says Chancellor Kent, "cannot be said strictly to make a will, yet she may devise by way of execution of a power which is rather an appointment than a will; and whoever takes under the will, takes by virtue of the execution of the power." 2 Kent, 171.

But whether such a paper, says Jarmin, Vol. 1, p. 36, "be or be not in technical strictness a will, or whether it ought to be termed an instrument in writing, * * * it is allowed on all hands that such a writing, if not a proper will, is at any rates of a testamentary nature, must be executed with the same solemnities as if executed by a person *sui juris*, must receive probate as any other will, and will have the same incidents, and, with some qualifications, a like operation. If the instrument, being to take effect after death, wants validity as a will, it is utterly void."

Redfield is to the same effect: "And where a married woman has power by marriage settlement, or any other valid contract, to dispose of her estate by will or testament-

any appointment, she can only do so by an instrument of that particular character, and it must be proved as a will." Red. on Wills, Vol. 1, p. 28-9.

It is clear that the conveyancer who drafted the instrument from Hayward to his wife, intending to limit the estate to his wife for life, intending, nevertheless, that she should have the power of disposing of the same after her decease, used words conferring that power with express reference to the doubt above suggested, whether the paper by which that power was to be executed would be in technical strictness called a will or otherwise designated.

The conveyance to Lively is, therefore, not only void, because attempting to convey the property absolutely by deed *inter vivos*, but because that deed could not possibly take effect as a testamentary paper, or as any conceivable instrument in the nature of a testamentary paper, not being attested by three witnesses.

The doctrine of the American courts as established by overwhelming weight of authority, is that the power of the feme covert over her separate property must be exercised according to the mode prescribed by the instrument under which she becomes entitled to the property, and to confine her to that particular mode, the instrument need not specially restrict her to it. 3 Johns. Chy., 77; 4 Md. Chy., 5 Md., 220; 1 Strob. E., 37; 6 Rich. E., 75; 3 Green N. J.

In Wright vs. Brown, (8 Wright, 44 Pa., 224,) a married woman's mortgage of her separate estate was declared void because the deed of settlement did not give the express power to sell or mortgage, and on that subject, said Strong, Justice, (now of the Supreme Court of the United States,) "silence is prohibition."

Much more is the woman powerless when in the instrument settling her estate there are words of restriction.

Thus, says Judge Story, E. J., § 1382, a., "where there was a bequest of money and leaseholds to a feme sole for her own absolute use without liberty to sell or assign during

her life," it was held that she took the property absolutely, but without any power to dispose of it during her life, or in other words, with a restriction against alienation during her life. See Sec. 1393—4, *ib.*

A feme covert holding separate property in real estate by deed or will prescribing a particular mode of disposition, cannot dispose of it in any other mode, though the deed or will does not negative any other mode. 4 West Va., 249.

See the following cases:—

5 R. I., 121; 8 Humph., 159; 2 Head, 221; 56 Barb., 600; 9 Ga., 199.

But it may be replied that the conveyance to Lively is only such a defective execution of a power as a court of chancery will aid. I answer that the proposition can hardly be maintained that chancery will undertake to give validity to a will executed in the teeth of the requirements of the statute. Can chancery aid a will purporting to be executed under the power of devising real estate, when the pretended will is attested by but two witnesses? The question answers itself.

But further: The law in regard to powers is settled. That that if the power should be executed by a deed, and it is executed by a will, the defective execution may be aided; but if the power ought to be executed by a will and the donee of the power should execute it by deed, it will be invalid. 1 Story E. J., Sec. 173; 2 *ib.*, Sec. 1393; 10 Vesey, 378; 2 Stro., 231.

And as to the strictness with which the conditions annexed to a power are required to be executed, 4 Kent, 330, 331; Adams E. top. p. 228.

Says Chancellor Kent (Vol. 4, p. 331.) "It is the plain and settled rule that the conditions annexed to the execution of the power must be strictly complied with, however unessential they might have been if no such precise directions had been given. They are incapable of admitting any equivalent or substitution, for the person who creates the

power has the undoubted right to create what checks he pleases to impose to guard against a tendency to abuse. The courts have been uniformly and severely exact on this point. If a deed be expressly required, the power cannot be executed by a will; and if the power is to be executed by will, it cannot be executed by any act to take effect in the lifetime of the donee of the power."

If it is said equity should aid in case of a purchaser like Lively, the reply is, it will never aid a purchaser as against a creditor, for the latter is as much a favorite of a court of chancery as the former.

And in the case of *Bentham vs. Smith*, 1 Chevers 38, (2 U. S. E. Dig., p. 470,) equity refused to aid a purchaser, even as against children of the donee of the power. In that case land was conveyed in trust for A. during his natural life, and after his death to such persons as he should by writing in the nature of his last will appoint, and in default of appointment to his children. A. mortgaged the property and died insolvent and intestate, after foreclosure of the mortgage. Under bill by the purchaser under the mortgage, it was held that the children of A. could not be restrained from enforcing their claims in remainder.

What possible claim has Lively to the assistance of a court of chancery? None whatever.

The conclusion then is, as regards respondent Lively, that be the rights of Mrs. Hayward and her devisee, Harriet Forte Hayward, what they may, Lively's claim can be maintained only by the subversion of all the legal principles involved in the case.

M. D. Papy for Appellee.

We maintain—

1. That relinquishment of dower by a wife is a good consideration and valuable to support a subsequent settlement of property on her. 4 Dess., 227; 3 Paige, 440; 2 Bush, 535.

This is admitted by complainant's counsel, but he quali-

fies it by saying that the agreement to settle must be made at the time of the relinquishment and from the consideration for the act by the wife, otherwise the subsequent conveyance is voluntary, and if voluntary, void as to creditors.

If the subsequent settlement is made merely because the wife had formally relinquished, and not because in addition the husband at the time had promised to make the settlement, then as a voluntary settlement it is only void as to existing creditors, and is not to be impeached by subsequent creditors. In this case we aver that the settlement or trust deed was made in consideration of the relinquishment by Mrs. Hayward of her dower, which was done on a promise made at the time, and in consideration of such relinquishment that he would afterwards settle the property on her. This appears by the direct answer of Mr. Hayward, which is directly responsive to the bill and is not disproved. The recitals of the deed of trust, taken in connection with the answer of Mrs. Hayward, sustain this, for there could have been no reason why this recital should have been made, unless it was in fulfillment of his antecedent promise and agreement; for the conveyance, as a voluntary deed, would have been good on the simple consideration of natural love and affection, and which alone would have been used unless the deed was in fulfilment of this antecedent promise, and hence the consideration of relinquishment was expressed. Without the precedent promise, this expression would have been no consideration at all, or anything than love and affection. The particularities in mentioning this land, in which the dower was assigned, plainly indicates this, for her relinquishment of dower in other lands, of which no doubt she made many, was not referred to at all. Why? Because it was for the relinquishment on this land that the promise of the after settlement was made.

The agreement admits that whatever is said in the bill and answers, not in conflict with the matters agreed on, is true. Nothing in the agreement contradicts the allegations

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in the answer on this subject, and hence these allegations must be taken as true.

In this view of the question, then the deed of 1850, from Hayward to trustees, for the benefit of his wife, is good upon valuable considerations and cannot be impeached by the complainants. Even if not effectual at law to pass the legal title for want of witnesses at the time, it is, nevertheless, good as a covenant to stand seized to uses which a court of equity would enforce. A court of equity will likewise give effect to the paper for the purpose for which it was intended, because it regards that as done which ought to have been done according to the intention of the parties.

But as Hayward subsequently had the deed properly attested, and it was admitted to record before any lien attached in favor of complainants, the deed became effective even at law, and all right under it related to the time of its execution and delivery.

But if the deed was purely voluntary, we say that as it was delivered at the time it bears date, and possession passed under it, the rights of Mrs. Hayward became in equity perfect, because it was executed and delivered for the purpose expressed in it, and that although at law the legal title did not pass, yet as in equity the right vested, the completion of the deed, so that it operated at law before any lien attached, operated to complete the transfer and make that good which ought to have been made good when the deed was first executed, but was not by mistake or inadvertance.

Hence the conveyance in this case is not to be regarded as a settlement made in 1868 but as made in 1850, when there is no pretence it could not have been made as a voluntary conveyance. Then it is good against the complainants. Where a deed is found in the possession of the grantee, the presumption of law is that it was delivered when it bears date, and if a party alleges the contrary, he must prove it.

So here the deed is presumed to have been delivered to Mrs. Hayward at the time it bears date; the allegations to

the contrary are not proved. She is not obliged to prove what is already presumed.

Her answer to the bill attacking this deed is responsive to it, and is not, either in fact or in law, matter *aliundi* or new matters in avoidance of the allegations of the bill, which she is bound to prove. As it is responsive, it must be taken as true, because not disproved and not in conflict with anything in the agreement. See *Souverby vs. Arden*, 1 John. Chy., 240.

2. If Mrs. Hayward could not make a mortgage, the objection would have no effect here, for it would only result that the mortgage was void; thus no forfeiture. 16 Vesey, 138. The mortgage was not in execution of the power, but only of rents and profits, &c. But she could legally make it, because in doing so it bound her life interest only. Her right to mortgage her estate is not doubted.

The execution of the power in this case is not confined in the manner of doing so to a will. It may be done by deed by the terms "or in any other manner."

If it can be done in any manner she might adopt, then the effect is to be ascertained by learning what was her intention.

If the deed to Lively was intended in execution of the power, as is clear from the fact that the deed recites the power and is in form to accomplish that which the power authorizes to be accomplished, then it follows that the intention to accomplish the result is established, and it need not express the effect or result which it does in fact accomplish. See Washburn on real property, 319 and 320; 7 Penn., (Barr.) 530; 18 Missouri, 229; 2 Vesey, 593.

But if the execution of the power is defective, equity will aid it, for though equity does not interfere in the non-execution of a power, yet it will aid it by executing what the donee wished to do but failed to accomplish. 5 Florida, 79; See 2 Washburn, 334.

Especially should this be done when the execution of the

power here is for a valuable consideration. This is all shown in Mrs. Hayward's answer, where she says she made the conveyance in execution of the power, or words implying the same thing.

Lively is not concerned in the question as to whether the deed was voluntary or not. He took as a *bona fide* purchaser without notice. He is only concerned in the question as to the execution of the power.

A voluntary deed from a man who is not indebted at the time, is not void against subsequent creditors. 8 Wheat., 229.

Now Mr. Lively had notice of what? The record disclosed to him that a deed was executed fully in 1850. The record was not necessary to complete the title. The record was to protect against subsequent purchasers or creditors, and being recorded before any other deed, or judgment, or lien attached, protects it. There were no existing creditors in 1850; no pretence that the deed was in fraud of such. Then the deed, even if voluntary, was good, and if good, the subsequent insolvency could not affect it; and if good, then anybody could buy the property and take a good title. Even if Lively had not bought, Mrs. Hayward herself could set up the deed as against these complainants if it was good at its date; and so far as Lively is concerned, it must be considered as fully executed in 1850. And if so, then it was good as a voluntary deed even, and Mrs. H. could sell and Lively could buy, and any subsequent indebtedness of Hayward could not affect it one way or the other.

An estate for life, with an unqualified power to appoint the inheritance, comprehends everything. By her interest— she can convey the life estate. By this unlimited power she— can convey the inheritance. The whole equitable fee is— subject to her disposition. 16 Vesey, 138; 19 ib., 86; — ib., 594.

A deed defective for want of the necessary formalities t— enable it to pass the legal title, is, nevertheless, good as contract or covenant to stand seized to uses or as a trust, —

the exigencies of the case may require. Perry on Trusts, 66; 5 John. Ch., 224; 10 Grattan, 259; 1 Dallas, (S. C. of Penn.,) 435.

Where the settlement is in favor of the wife, the consideration is meritorious and equity will enforce it, when it would not as against a stranger who is a volunteer. 10 Grattan above cited; 1 John Ch. 336.

A conveyance of land, though not registered, if made *bona fide* and for valuable consideration, is good against creditors. 2 Stewart, 488.

And if placed on record before any lien attaches, it cannot be overcome by any subsequent purchaser.

The case relied on from 21 Iowa is maintained not to be applicable. The principle there decided is not contested here, but there the husband gave his wife money long after the alleged promise to her was made, and when he was not only indebted but insolvent. What was this but a settlement at a time when the husband was indebted and insolvent? How does that case apply here, when the settlement was made years ago and when the husband was competent to make it, and which was only imperfect as a deed at law but good in equity, and which was perfected before any lien attached, and under circumstances that if not voluntarily done by Hayward, a court of equity would have compelled him to do? The counsel on the other side ignores everything anterior to the date of the record of the deed, and herein consists the mistake into which he has fallen.

Lively could not know anything except what the record disclosed, and that disclosed a good deed executed in 1850, as he could not know that it was not witnessed until the date of the record. That is all the notice he had, and he can be bound by nothing else. Suppose that he did know that the date of the record of the deed Hayward was insolvent, how could that insolvency affect the validity of an apparently and, so far as Lively knew, a good and perfect deed executed in 1850, when Hayward was perfectly com-

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petent to make it? No authority can be produced, it is respectfully maintained, to support such a proposition. If the principle is maintained, few persons would be disposed to buy property.

In *Hall vs. Wilson*, 8 to 6 Wallace, the Supreme Court of the United States say, a man is not to be considered as having notice when he did not have notice, but when he is to be affected by constructive notice, it is not that he is to be affected for want of due diligence, but only for gross negligence. What was there here to put Lively on equity? Nothing, for the record at a late date means nothing except that the grantee omitted to do it, and there is no law which attaches any other consequence to the omission, than it should give way to other conveyances or liens which may have attached in the meantime. His only inquiry was, then, whether there was any subsequent deed or judgment or lien between this date of the deed and the record, and finding none, he could legally buy and is protected, and there is nothing else he is required to inquire about.

The question of the statute of limitations by the possession of Mrs. Hayward for the sufficient length of time prior to 1860, is presented on the record as a defence. It is not specially argued in argument, because it is believed the other questions are conclusive of the case.

FRASER, J., delivered the opinion of the court.

On and previous to the 15th of April, 1850, Richard Hayward was the owner in fee simple of a lot of ground in the city of Tallahassee, at which time he was a man of large means, entirely solvent, and abundantly able to make the conveyance next mentioned, without affecting his solvency or impairing the claim of any creditor, and on that day he executed a writing in the form of a deed, without witnesses, purporting to convey to Robert S. Hayward and Thomas H. Austin the said land, "in trust for the only use, benefit and behoof of Harriet W. Hayward, wife of the said party of

The first part, during and for the term of her natural life, and to such further use as the said Harriet W. Hayward may, by her last will and testament, or in any other manner, appoint, to take effect after her decease," with the covenant that the land conveyed should not be "subject to or for any of the debts, contracts or engagements of her husband, and that the same shall remain and continue in the possession and under the control of said Harriet W. Hayward, and be subject to the control and direction of no other person whomsoever."

It is recited in this writing that in the years 1844 and 1845, Harriet, the wife, in order to enable her husband to pay certain debts, released her right of dower in sundry tracts and lots of land, sold by her husband for that purpose. This paper, expressed to be in consideration of such relinquishment of dower, was delivered by said Richard to said Harriet, April 15th, 1850, but was not witnessed and admitted to record until September 13, 1865, at which last date Richard had become insolvent. The paper was then subscribed by two witnesses, proved and recorded. It is agreed by the parties that the recitals in this deed, with respect to the relinquishment by the said Harriet of her dower in sundry lots and parcels of land therein described, are true.

Robert S. Hayward, one of the trustees, died in or about 1852.

August 9th, 1866, in consideration of a debt of \$4,100, due from Richard to Elizabeth G. Hogue, wife of William S. Hogue, and to secure its payment, Richard and Harriet, his wife, executed their mortgage upon the south half of the lot mentioned.

Richard died in January, 1867.

May 20, 1868, Hogue and wife assigned the mortgage to Mathew Lively, and on the same day Harriet, being then a widow, joined with her surviving trustees, Austin, in

a deed to Lively for the south half of the lot in question, being the part covered by the mortgage.

This last deed purports to be in execution of the power contained in the deed of trust.

It is agreed by the parties that the matter set up in the answers of the defendants, or either of them, responsive to or explanatory of the bill of complaint, are true, unless overcome by proofs according to the rule of evidence in chancery.

The complainants charge in their bill that the consideration of the deed from Richard, in trust for his wife, was altogether voluntary, and that no money or other thing of value passed between the parties as the consideration therefor.

Mr. Hayward answers that the deed of trust was not a mere voluntary deed, but for a valuable consideration, and sets forth the consideration to have been her previous relinquishment of her dower in certain lands, and was in fulfillment of an agreement between her and her husband at the time of such relinquishment; and she explains the particulars of the agreement then made between her and her husband.

Harriet, the widow, died December 17th, 1869, having first made her will, by which she devised to her granddaughter, Harriet Forte Hayward, the property conveyed by Richard to trustees for the use mentioned in the deed of trust.

The complainants, judgment creditors of Richard, filed their bill in the Circuit Court of Leon county, to set aside amongst others, the foregoing conveyance, as fraudulent against them, and insisting that the lot in question and other lands not involved in this appeal, are liable to the payment of their judgment, which was rendered August 1868, and on which execution was issued and returned *nulla bona*.

The lot of land mentioned is all that is in question —

this appeal, and the only parties interested are the administrator of Harriet W. Hayward, Mathew Lively, who claims the lot as purchaser in the manner stated, and Harriet Forte Hayward, the devisee of Harriet W.

The court below made a decree dismissing complainants' bill as to these defendants, from which decree the complainants appeal.

The first question to be considered is, what is the effect of the deed of trust from Richard to Austin and Hayward, trustees for his wife?

Complainants insist that this deed was a voluntary conveyance, without consideration, and therefore void as to creditors, and so charge in their bill of complaint. Mrs. Hayward answers that there was a valuable consideration; and states it to be, that in the years 1844 and 1845, she relinquished her dower in certain other lands, upon the promise made her by her husband at the time that he would settle upon her other property, and the complainants have agreed that this answer is true, if responsive to or explanatory of the bill, unless they should overpower it with other proof.

No evidence was taken in the cause. The question, therefore, is, whether this answer is responsive to or explanatory of the bill?

This response to the charge in the bill amounts to such a direct and absolute denial, that it should seem superfluous to attempt to prove by argument that it is responsive. One says there was no consideration; the other responds there was a consideration, and explains particularly what that consideration was, the charge and the response, the assertion and denial, operating one directly against the other.

But it is urged that such a relinquishment is not a valuable consideration. That it is a valuable consideration, and will support a subsequent settlement upon the wife, we have abundant authority. 4 Dessau., 227; 3 Paige, 440.

In Woodson vs. Pool, 19 Mo., 344, and one of the cases

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relied on by complainants' counsel, the court say, "there can be no question but that a wife's relinquishment of her dower is a sufficient consideration to support a suitable conveyance to her for such relinquishment," and in that case the wife failed to sustain the conveyance to her only for want of proof of such consideration, for in such case it is necessary that the proof be clear.

In *Wickes vs. Clark*, 8 Paige, 163, it is said that "in order to render these advances of the wife's property a consideration for the subsequent settlement of the husband's property upon the wife, it should appear that there was either an agreement between the husband and wife at the time the advances were made to secure her by settlement, and such an agreement as would be obligatory upon him to perform or that her parting with her property, or incumbering it for her husband's benefit, was intended to serve as a consideration for a settlement to be afterwards made by him, and that the deed of settlement, when executed, had reference thereto; in short, that there was some connection between the previous advances and the subsequent deed."

In the present case, it appears that Mrs. Hayward gave a valuable consideration; that there was an agreement between her and her husband, at the time she relinquished her dower, obligatory on him to perform; that the deed of trust was executed in reference thereto, and it does not appear that the one was not a fair equivalent of the other. The deed of trust, therefore, is valid against creditors.

It is evident, that as the deed of trust gave to Mrs. Hayward only a life estate, with a power of appointment, the residue resulted of the residue to the grantor, Richard Hall, liable to be divested upon the appointment being made in accordance with the power.

The mortgage executed by Hayward and wife to being in direct violation of the terms of the trust, is

Mrs. Hayward could not encumber this estate with the debts of her husband; it is expressly prohibited

terms of the trust deed, and as the mortgage was of no validity, the assignment thereof to Lively is of no avail to him.

The attempted execution of the power by Mrs. Hayward and her trustee by the deed of May 20, 1868, to Lively, is also inoperative. A power, directed to be executed by will, cannot be executed by deed, and this trust expresses clearly that the execution must be by a writing in its nature testamentary, or such as shall take effect after the decease of Mrs. Hayward. A deed takes effect *in presenti*, a will can only take effect after the decease of the testator. In Sugden on Powers, Vol. 1, (marg.) 256, it is clearly laid down, upon abundant authority, that a power to be executed by will cannot be executed by any act to take effect in the lifetime of the donee of the power, and which we understand to be the settled doctrine.

It will, therefore, be seen, that while the complainants cannot make the lot in question liable to the payment of their judgment, Lively acquired no title by virtue of the mortgage, nor by the deed of Mrs. Hayward to him, and Mrs. Hayward having executed the appointment by will, the resulting trust to Richard Hayward and his heirs was thereby divested.

It is adjudged that the decree of the court below, so far as it dismisses the complainants' bill of complaint as to the parties therein named, be affirmed, and that in so far as said decree in any manner affects the rights of property of Harriet Forte Hayward, that it be set aside.

The following petition for re-hearing was filed by counsel for appellants:

The appellants, by their counsel, *R. B. Hilton*, apply for a re-hearing in this cause, and for reasons therefor set forth the following:

It is respectfully submitted that the court over-estimated the force and effect of Mrs. Hayward's answer, in connection with the agreement entered into by the counsel of the

parties. That agreement was intended to obviate the necessity of taking testimony in reference to all points upon which the parties concurred as to the facts: such as, that Mrs. Hayward did, in fact, relinquish her right of dower in certain lands of her husband in 1844; that her husband was unembarrassed in 1850, at the date when the deed of settlement was drafted, &c., &c. As to other facts or allegations, the intention of the parties, in entering into the agreement, was to leave those facts and allegations to be determined under the pleadings and proofs in the case, in accordance with the "rules of evidence in courts of chancery." It was not imagined by the counsel of the plaintiffs, that in entering into that agreement that he was consenting to give to the answers of the defendants, or either of them, any other force and effect than that to which they were entitled under the rules of chancery. Nothing more than this was contended for by the counsel of the defendants, either in the court below or in the Supreme Court. Mr. Peeler, the counsel who drafted the agreement, at the argument below expressly disclaimed any purpose to give to the terms of the agreement any other signification than this. It is very respectfully urged that it was an inadvertence on the part of the Judges of the Supreme Court to have made the answer to Mrs. Hayward conclusive in defeating the claims of the plaintiffs; and that the court thus gave to it a degree of weight to which it was not entitled, "according to the rules of evidence in chancery."

In an allegation of "fraud" in a bill in chancery, an answer denying fraud generally amounts to nothing. The question must be determined by the facts and circumstances and law of the case.

Mrs. Hayward's answer alleges a "promise" of her husband at the time of her relinquishment of dower to make settlement upon her. The bill does not deny such a "promise;" it says nothing about a "promise," one way or the other. What, therefore, she says about this alleged "promise"

ise" is new matter on her part, in no wise responsive to anything in the bill. It was something of which, if true, in order to avail herself it was incumbent upon her to prove. Especially was this so, inasmuch as the very recitals of her deed by their silence on this point, while so full on others, gave contradiction to the allegation of a "promise."

It is further submitted, with great deference, that the decision of the court in Woodson vs. Pool, 19 Mo., 341, was directly in conflict with that announced in the opinion of this court. The head note in the Missouri case is as follows:

"A conveyance for the benefit of a wife in consideration of dower, *previously* relinquished by her, is voluntary as to existing creditors."

(The word "previously" is italicised in the report.)

The head note, in the case at bar, is as follows:

"A relinquishment of dower by a wife, for the benefit of her husband, is a sufficient consideration for a *subsequent* settlement upon her by him."

The Missouri court say, in the course of their opinion, "if the right to dower has already been assigned, a conveyance in consideration of such an act previously done would be voluntary as to existing creditors."

It will be remembered that Mrs. Hayward's assignment of dower in her husband's lands was in 1844, while the settlement made on her by her husband, in (alleged) consideration thereof, was not executed and recorded until 1865, twenty-one years subsequent; and that her husband, at the date of its execution, was utterly and overwhelmingly bankrupt.

It does not appear from any portion of the opinion of the court read in this case, that they considered the effect of this very protracted interval which elapsed between the date of the two transactions.

The vital question in the case, in the view taken of it by counsel for complainants, was, whether a husband, after

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holding himself out for twenty-one years as the owner of valuable property, and obtaining credit as such owner, could then defeat the claims of his creditors by conveying the property to his wife for and upon a consideration which had passed and been executed twenty-one years previous, thus providing for his wife, children and himself, at the expense of his creditors and their wives and their children? Upon this point, (necessary, it is submitted, to a decision of the case,) the court (doubtless inadvertently,) omitted to pass, and that "omission" is assigned as one of the grounds upon which a rehearing is humbly prayed.

To hold such conveyances and family settlements valid, whether based upon a "promise" or not, (made twenty-one years before) it is submitted, would be opening the very flood gates of fraud.

It will be observed, by reference to the opinion of Mr. Justice Fraser, that he takes no notice of the elementary authorities, Atherley and Lomax, cited by appellants' counsel, nor of the cases in the Virginia reports, (Grattan,) the Kentucky reports, (Bush especially,) the Iowa and Pennsylvania reports, the South Carolina cases in McMullan's reports, in Rice's reports, and in McCord, all cited in appellant's brief: and all inconsistent, as petitioner humbly believes, with the conclusion of this court, as to the validity of Hayward's settlement on his wife, when brought in conflict with the rights of his creditors. The petitioner feels bound to believe that a careful examination of these authorities and cases will bring the court to a different conclusion.

The decision of this court is, that all the property in controversy, embracing the lots on which were erected two stores, belongs to Harriet Forte Hayward, as devisee of her grandmother, Harriet W. Hayward. Mrs. Hayward's will bears date some time anterior to her conveyance to Lively. By that conveyance she sold or attempted to sell to Lively one-half of this property. As to that half, it is submitted that the deed to Lively was a revocation of the will, and

that as to that half, Mrs. Hayward died intestate. She, therefore, as to that not having executed the power of appointment, given to her by the terms of her husband's settlement, it falls back into and becomes a part of her husband's estate, and is subject to the judgment of the complainants. As the conclusion arrived at by this court, in awarding all the property to Mrs. Hayward's devisee is one not mooted in the court below, or in the argument of counsel on either side in this court, it is respectfully prayed that an opportunity may be given for argument upon the questions involved in that conclusion.

All of which is respectfully submitted.

On which petition, RANDALL, C. J., delivered the opinion of the court as follows:

The counsel for appellants presents a petition for a rehearing in this case and submits that "the court over-estimated the force and effect of Mrs. Hayward's answer in connection with the agreement entered into by counsel for the parties. That the agreement was intended to obviate the necessity of taking testimony in reference to all points upon which the parties concurred as to the facts," and as to other matters and allegations, the intention of counsel was "to leave them to be determined under the pleadings and proofs in the case in accordance with the rules of evidence in courts of chancery." And it is urged that it was an inadvertence on the part of the justices of this court to have made the answer of Mrs. Hayward conclusive in defeating the claims of the plaintiffs, and that the court gave to it a degree of weight to which it was not entitled according to the rules of evidence in chancery. The counsel further says: "To an allegation of fraud in a bill in chancery, an answer denying fraud generally, amounts to nothing. The question must be determined by the *facts and circumstances* and law of the case. Mrs. Hayward's answer alleges a 'promise' of her husband *at the time* of her relinquishment of dower to

make a settlement upon her. The bill does not deny such a 'promise;' it says nothing about a promise one way or the other; what, therefore, she says about this alleged *promise* is new matter on her part in no wise responsive to anything in the bill. It was something of which, if true, in order to avail herself, it was incumbent upon her to *prove*."

I. The agreement referred to is a stipulation signed by all the counsel in the case, and which, with the bill, answers and exhibits and copies of the conveyances referred to therein were the only evidence submitted to the Circuit Court upon which the decree was made. This agreement, after enumerating sundry facts agreed upon, concludes thus: "And it is further understood and agreed that nothing herein contained is to preclude the defendants from insisting upon any other matter of defence set up in either of the answers herein except in so far as is inconsistent with this agreement, and that the matter set up in the answers of the defendants, on either of them, *responsive to or explanatory of*, or in admission of the allegations of the bill of complaint, not inconsistent with this agreement and the admissions herein made, *as true*, unless *overcome by proofs* according to the rule of evidence in courts of chancery with respect to the effect to be given to an answer."

Now, it seems to the Circuit Court that the answer of Mrs. Hayward, in so far as it alleged a valid consideration for the conveyance to her by her husband of the real estate mentioned, was directly "responsive to and explanatory of the allegations of the bill of complaint," and therefore her answer as to the validity of the conveyance and the absence of fraud in the very transaction which the bill alleged to be fraudulent.

This court also examined this feature of the case and arrived at the same conclusion, that that part of the answer of Mrs. Hayward was responsive to the allegation of fraud contained in the bill.

The bill alleges that the conveyance by Hayward

trustees for Mrs. Hayward's use was voluntary, no real consideration having passed, that it was never delivered, that it was kept secret and in the possession of Richard Hayward from 1850 to 1865, and that its intent and purpose was "illegally to hinder, delay and thwart the creditors" of Richard Hayward.

Her answer, not only denying the fraud in express terms, but alleging facts which of themselves nullify the imputation of fraud, it seemed to us, was the subject of the stipulation of counsel, not alone as to its denials, but as to its allegations of matters of fact constituting a part of the transaction, and therefore necessarily "responsive to and explanatory of the allegations in the bill." I understood, as I now understand, that the purpose of the stipulation was to avoid the trouble and expense of taking testimony, and to present the facts in issue to the court, not only such facts as to which there was no disagreement between the parties, but such other matters as were responsive to the allegations of the bill or explanatory thereof; all which are admitted to be "true, unless overcome by proofs according to the rules of evidence in courts of chancery with respect to the effect to be given to an answer." We conceived that a statement in the bill, that a transaction was fraudulent, and that it occurred under certain circumstances tending to show it to be so, was directly responded to and explained by a recital of all the circumstances *under which the identical transaction occurred*, and which tended to *disprove the fraud alleged*, and that the stipulation that such counter allegations should be taken as true, unless disproved, required of the party holding the affirmative of the case to meet the counter allegations by something more than a reiteration of the charge with no rebutting proofs.

The party, by the stipulation, undertook to disprove all the allegations in the answer which were responsive to the charge that the conveyance was voluntary, without con-

sideration and fraudulent, or to stand by the effect of the answer if he failed to disprove it.

The inquiry of the bill is as to the validity of the consideration of the conveyance. The answer discloses the entire consideration. It refers to no other transaction than that which was the direct subject of the inquiry.

The rule is explained in a case before Lord Chancellor Cowper in 1807, reported in Gilbert's Law of Evidence, p. 45. It was the case of a bill by creditors against an executor for an account of the personal estate. "The executor stated in his answer that the testator left 1,100 pounds in his hands, and that *afterwards*, on a settlement with the testator, he gave his bond for 1,000 pounds, and the other 100 pounds was given him by the testator as a gift for his care and trouble. It was resolved by the court that the defendant must make out by proof what was insisted on by way of avoidance. But if the admission and avoidance had consisted in the single fact that the testator had given him the 100 pounds in the first instance, the whole must be allowed, unless disproved."

The gist of the rule is, that if the answer refer to and explain the particular transaction or consideration to be inquired of, it will stand until disproved.

Chancellor J. Savage, in *Murray vs. Blatchford*, 1 Wend., 618, says: "The main question in this case is the question of fraud. The bill charges that the defendants acted fraudulently and in bad faith, and in relation to the defendant Murray, several facts are charged as evidence of the fraud. Among these are attempts to delay a decision of the cause, by appeals to this court. He twice appealed, and at each time suffered the appeal to be dismissed. This is admitted by Murray, but he declares that the appeals were brought *bona fide*, with an intention to have them argued and decided by this court, but that his counsel advised to the course which was adopted. The counsel, after the appeals brought, were of opinion that after certain other steps should have

been taken in the cause, the errors which they were advised existed would be more apparent. The answer is given under oath, is responsive to the bill, and is not contradicted. It must, therefore, be taken to be true, and, if true, *rebutts the idea of fraud.*" And Judge Story has this language: "The plaintiff calls upon the defendant to answer an allegation of fact [of fraud] which he makes; and thereby he admits the answer to be evidence of that fact. * * * Not only is such an answer proof in favor of the defendant as to the matter of fact, of which the bill seeks a disclosure from him, but it is conclusive in his favor, unless it is overcome by satisfactory testimony." (Story Eq. Jur., § 1528, and citations.)

The counsel for appellants says that the bill says nothing about the "promise" made at the time of the relinquishment of dower to convey or to make a settlement upon her, and that, therefore, what the answer says about a "promise" is new matter on her part, and in no wise responsive to anything in the bill.

We have duly considered this suggestion, but as the inquiry of the bill is to the question of fraud in the whole transaction, the charge being that the conveyance was voluntary and without real consideration, we cannot see that it is otherwise than directly responsive to the charge, and in the language of Chancellor J. Savage, "rebutts the idea of fraud." Nor do we discover that her allegation gives either a direct or indirect contradiction to the recitals in the deed of trust; it is cumulative and consistent with the recitals.

II. Counsel for appellants, in his petition, submits that the opinion of the court in this case is directly in conflict with that in Woodson vs. Pool, 19 Mo., 341; and quotes the head note of the opinion in each case to show the discrepancy.

But we must be pardoned for suggesting that the head note in this case, as originally written, may not give the entire scope of the opinion, and it may be necessary to make

some verbal change in it, and we must further submit that on examination of the opinion in this case, it will not be found that there is anything in it in conflict with that in Woodson vs. Pool. We dealt with this case as we found it in the record, and the Supreme Court of Missouri decided that case upon the record before it.

The circumstances of that case were widely different from those in the case at bar. In that case there was no contemplation of a subsequent settlement at the time of the relinquishment of the dower, but it was evident that the recital of the former relinquishment as a consideration of the conveyance to his wife was a mere attempt to save the property of the husband from his creditors.

Counsel for appellants, in his brief, says: "It is not denied that a husband may make a valid settlement upon his wife, in consideration of a portion coming to her, agreed to be paid to him, or of her relinquishing any interest in his property, even though that interest be contingent or inchoate, as the right of dower for instance. But to support such a settlement against creditors, whose debts accrued prior to it, the court will require every reasonable proof that the portion was paid, or the relinquishment made in consideration of the making of the settlement." (Citing Atherley on Mar. Settlements, 83.

The conveyance in the case at bar was not merely a "voluntary settlement," but was made for a valuable consideration, in pursuance of an agreement made at the time the consideration was received; was made in good faith, and without notice of any fraudulent intent of the grantor.

This case differs also from the circumstances of that of the Bank vs. Mitchell, Rice's Eq. R., 389, cited by counsel. The conveyance in that case was made in consideration of an agreement which was, by express statute, void as to creditors. The court say that they were inclined to support the conveyance, but that to do so would be, in effect, to write "repealed" on the statute.

The other cases referred to by counsel, with the remark that the justice who delivered the opinion failed to take notice of them, and that the opinion is inconsistent with them, were examined before the opinion was written, and have been read since with reference to the petition for rehearing, but we fail to see that they are very like the present case, or that the principles announced in them would lead us to a different conclusion.

Lord Chancellor Hardwicke, in *Ward vs. Shallet*, 2 Ves. Sen. 16, says: "To be sure it is the duty of assignees under the commission to endeavor to increase the estate for the benefit of creditors, and to inquire into any family transaction, especially between husband and wife, which is liable to most suspicion. But the court must not carry it so far as to set aside an act for a valuable consideration, and if this was to prevail, it is one of the hardest demands I ever saw."

(The case was one in which the wife had a contingent interest in a bond given by the husband, which she relinquished, in consideration of which a settlement was made upon her and her children.)

Mr. Atherley says: "It may perhaps be thought that a husband and wife cannot contract with each other, and, consequently, that a post-nuptial settlement, which arises out of an agreement between husband and wife, must be purely voluntary. We shall find, however, that this is not the case, but that settlements, resting on such agreements, have frequently been held good. Nor have they been hastily supported. In the case of *Lady Arundel vs. Phipps*, (10 Ves., 148,) Lord Eldon expressly adverted to it, and clearly held 'that a husband and wife, after marriage, could contract for a *bona fide* and valuable consideration for a transfer of property from the husband to the wife, or to trustees for her, and that the doctrine was so, both in equity and at law.' And the point also appears to have been adverted to by Lord Hale, in the case of *Clark vs. Nettleship*, 2 Lev.,

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149. * * * In inquiring into the validity of post-nuptial settlements, the true and only point of inquiry, I conceive, is, whether the settler has received a fair and reasonable consideration for the thing settled, so as to repel the *presumption of fraud*." (Atherley on Mar. Sett., 161.)

The case of Reade vs. Livingston, 3 Johns. Ch., 481, was upon a settlement made in pursuance of a parol agreement made with the wife's father in contemplation of marriage and the settler was indebted at the time of the conveyance the marriage having taken place in 1791 and the settlement in 1805, of property of great value. The chancellor held the settlement to have been voluntary as to creditors, and the whole discussion of the opinion is upon the subject of *voluntary* settlement; but the chancellor takes occasion to endorse the treatise of Mr. Atherley in the strongest terms, and puts the case upon this point, stated by Atherley, that a "settlement after marriage cannot rest its validity as against creditors, on a mere parol agreement before marriage."

In the case of Lewis vs. Caperton, 8 Gratt., 150, cited by petitioner, there was no proof whatever of an agreement for a settlement in consideration of the relinquishment of dower, but, as the court remarks, only proof of casual conversations between the wife and other persons; and the court emphasizes the fact, that there was no such agreement and the relinquishment was purely voluntary.

And W. and M. College vs. Powell, 12 Gratt., 385, says distinctly, that a post-nuptial settlement, in favor of a wife made in pursuance of a fair contract for a valuable consideration, will be held good, is a doctrine supported by abundant authority; and although it may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet, if the wife has relinquished her interest in property on faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with,

and this, though the settlement may have been made subsequent to the relinquishment.

We cannot close this part of the case in better language than that used by the learned Justice in *Latimer vs. Glenn*, 2 *Bush*, (Ky.,) p. 544, as to the character of Mrs. Hayward's title, and with our construction of the stipulation as to the effect of the answer that it stands upon the record as true: "Her equity," says the court, "is as elevated and pure and sacred as that of any creditor of her husband; her conduct is free from any fraud or overreaching, or concealment of any character; nor does it manifest any desire to screen the property of a failing husband from the just demands of his creditors, but only an honest effort to secure that which she regarded as her own, and which had been frequently accorded to her in the most prosperous days of her husband, and for which she had paid an ample consideration."

III. The omission of the court to allude in the opinion to the fact that the conveyance was not made until twenty-one years after the consideration (the release of dower) had transpired, is made one of the grounds of the application for a rehearing. The dower was released in 1844, and it is said the deed was not executed and recorded until 1865. This statement, standing alone and unqualified, is a very strong argument in favor of the petitioner. But is this the whole story?

The facts are that in 1844, Mr. Hayward, being embarrassed by debts, induced his wife to relinquish her dower in valuable property by agreeing to make at some subsequent period a conveyance to her of other property. He could not do it at that time on account of his embarrassment. In April, 1850, he made and signed the deed of the Tallahassee lot purporting to convey it to trustees for the use of Mrs. Hayward for life, but this deed was not then effective because not witnessed. The bill charges that Hayward kept this paper in his possession secretly from 1850 to 1865. Mrs. Hayward says it was delivered to her at its date by Mr. Hay-

ward, he stating to her that it was executed fully, and that he had thereby complied with his promise to her when she relinquished the dower, that she believed the deed was fully executed, there was nothing secret about it, that the property was afterwards treated and spoken of publicly and privately as her property, and she kept the deed among her own papers.

Mr. Austin, one of the trustees, says he was made aware of the existence of the deed soon afterwards, and was informed that all was done that was necessary to make it complete. At this time the grantor, Mr. Hayward, was in good circumstances. Will it be pretended that if this deed had been fully executed at that time, as Mrs. Hayward believed it was, it was liable to the imputation of fraud?

Subsequently Mr. Hayward moved to Louisiana with property and means valued at \$130,000 or more. During the war he seems to have lost his property, like many others and returned to Florida in 1865. In September of the year, the deed to Mrs. H. is presented for record, and was then perfected and recorded. During all this time Mrs. E. says she had possession of the deed, believing it to be good. She, if anybody, had been deceived during all those years being made to believe that she had a good title to a town lot in Tallahassee. If so, for what purpose was the fraud undertaken, and to what end was it sought to be carried? There was no fraud upon these creditors in 1850 by the making of this deed, for they were not creditors, but if fraud at all, Mrs. Hayward was the victim, and her equities date from 1844, while the complainants did not become creditors until some twelve or fifteen years afterwards. In a contest between these complainants, as creditors, and Mrs. Hayward, as a prior creditor, who had been led to believe she was secured when she was not entirely so, whose scale must kick the beam?

Any third party holding a document like the paper she held, might have compelled a conveyance at any moment.

and were her rights less sacred, or less valuable than those of any other, because she was a married woman and did not distrust her husband?

"To authorize the court to interfere with, (say the court in *Seward vs. Jackson*, 8 Cowen, 406, and in *Wickes vs. Clarke*, 8 Paige, 165,) and declare a voluntary settlement void, even as to creditors whose debts existed when the deed was made, intentional fraud must appear, and prior indebtedness is but a badge or argument of fraud, which may be explained or repelled by circumstances." And how much stronger must this case stand in favor of Mrs. Hayward, when the debts had no existence at the time the deed was delivered to her and she was made to believe she had what she was entitled to; when the conveyance was not merely voluntary, but upon a valuable consideration, and where there was no room for suspicion of bad faith.

The deed to her trustees was drawn up and signed in 1850. It was not completed until 1865, for the reasons stated, and however strong the suspicion arising out of the non-completion of it, it is yet but a suspicion, which has been, in our judgment, entirely removed by a consideration of all the circumstances of the case.

IV. Counsel for complainants further submits that Mrs. Hayward, having made her will, and thereby exercised the power of appointment, by devising the entire property in Tallahassee to her granddaughter, and after making the will, having executed a deed to Mr. Lively of one-half the property, this deed operated as a revocation of the will as to this half; and, therefore, as Lively's deed was not a proper exercise of the power of appointment and conveyed no interest, which survives Mrs. Hayward as to this half, it falls back into the estate of Richard Hayward, and is subject to the complainants' judgment. If this conclusion be correct, the plaintiffs have but to sell this half upon their execution, and they do not need the aid of a court of equity. But on the other hand, if the deed to Lively is void as an execution

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of the power of appointment, it is equally inoperative as a revocation of the will. If it was a good revocation of the will, it is because it otherwise disposes of the estate by a valid appointment. In either event it does not fall back to the estate of Richard Hayward.

I have not been able to conclude that a rehearing should be granted to the petitioners, the complainants in the case; and I am supported in this by the judgment of the Justice, who has come to this bench in the place of Mr. Justice Fraser, resigned, (who prepared the original opinion,) who has examined the case with care with reference to this petition.

It is therefore ordered that the petition of the appellants be and the same is hereby refused.

A petition is presented also by counsel for Lively, one of the defendants in the case, praying a modification of the judgment and of the opinion, so far as it affects his interests in the particulars specified in his petition. Without further remark upon the merits of the petition, it is suggested that there may have been some misapprehension as to the judgment proper to be given in regard to the respective interests of Mr. Lively and Harriet Forte Hayward, the infant defendant, and considering the recent change in the constitution of this court, we have determined that counsel may be heard further in that behalf, after due notice to the guardian *ad litem* of said infant.

M. D. Papy, Esq., counsel for M. Lively, filed the following petition for rehearing:

Counsel for M. Lively respectfully petitions the honorable court for a review of so much of the opinion pronounced in this case as declares the views of the court in regard to the relative rights of M. Lively and the grandchild of Mrs. Hayward in that portion of the lot which was conveyed to Lively, and for permission to argue the question as between these parties, who are joint defendants in the case.

The following grounds and reasons are offered for the consideration of the court:

Counsel for M. Lively understands that the opinion of the court that the power in this case must be executed by will alone, is based upon certain words on the deed, viz.: "to take effect after her decease," and that the court understood these words to apply to the instrument by which the power is to be executed, instead of the estate or property or use upon which the power was to act. With all due deference to the court, and as this view of the subject was not advanced in argument by counsel at the bar, counsel for Lively avails himself of the privilege of directing the attention of the court to the precise terms of the deed and the significance which is due to the entire language employed. Premising that as a rule of construction full effect is to be given to every word, if it can be done consistently with the rules of law, so as thereby the better to carry out the intention of the grantor, I quote from the trust deed as follows: "To have and to hold, &c., &c., for the only use, benefit and behoof of Mrs. Hayward during and for the term of her natural life, and to such further use as she, the said Harriet Hayward, may, by her last will and testament, or in any other manner, appoint, to take effect after her decease."

The words, "to take effect after her decease," in the judgment of counsel, clearly apply to the use or furtherance upon which the trustees were to hold, and not to the instrument by which the power was to be executed. If we transpose these words thus, it would leave no doubt: "and to such further use, to take effect after her decease, as she, the said Harriet Hayward, may, by her last will and testament, or in any other manner, appoint."

That this was the intention of the trust deed, appears from two considerations:

First. The use of the terms, "or in any other manner," clearly indicates that the whole range of means by which a

power could be executed was to be within the discretion of the donee of the power; and as in this case there is no restraint upon these terms, we must suppose it was the intention to give this discretion, because, if exercised by deed, it would be in all its consequences precisely what the latter terms would authorize, viz.: the use would by deed take effect after Mrs. Hayward's death in the appointee, and could by no means take effect before her death.

Second. Because, whether the words "to take effect after her death" were in the deed or not, such would be the result any way, for the use, in the appointee of the power, could only take effect after Mrs. Hayward's death, whether the power was executed by will or deed, and in neither event could it take effect before her death. The use, then, of the words, "to take effect after her death," have no further operation than if they were not inserted, for neither in this nor in any other case of a gift for life, with power of appointment of the remainder, no matter what may be the form by which the power is executed, whether by deed or will, the use or the estate in the appointee could only take effect after the death of the donee of the power. If the words, "or in any other manner," are to be given any signification at all, we are to understand them as authorizing an appointment by deed, for in this case the execution of the power by deed does not in the least counteract the expressed intention that the use for which the trustees were to hold was to take effect in the appointee after the death of Mrs. Hayward. A power to appoint by will, or otherwise has been decided to authorize an appointment by deed. The words, "or in any other manner," are the precise equivalent of "otherwise," for they are or constitute the very definition of the word. If we are to give them any effect in this case at all, we must understand them as authorizing an appointment by deed, because such is their significance in the relation in which they stand, and because there is nothing in the deed which makes the appointment "in any

other manner" than by will inconsistent with the manifest intention, and with the uses and purposes declared. I maintain, then, that by the rules of construction, the terms, "to take effect after her death," apply to the further use for which the trustees are to hold the legal title, and not to the instrument by which the power is to be executed.

This construction of the deed relieves all difficulty, and is consistent with the act of all the parties, with their purposes and intentions, and with the counsel and advice which were given to Mrs. Hayward in regard to her power of appointing by deed.

The case of Heatly vs. Thomas, 15 Vesey, 596, was one where the trusts of the deed were that it should be lawful for Sarah Johnson, (the beneficiary,) at any time during her said intended coverture, by her last will and testament in writing, or any writing purporting to be her last will, to be signed by her and attested, &c., to give and dispose of the said sum, &c., to such person or persons, &c., as she should think fit; and in case the said Sarah should happen to die in the life-time of the said William, her intended husband, and without making any will or other disposition, either of the whole or any part thereof, that then, as to the whole or such part as to which no gift or disposition should be so made by her as aforesaid, the same should immediately, on her death in the life-time of her intended husband, go and be paid, &c., &c., according to the statute of distributions. James Willis afterwards borrowed from the plaintiff in the case £700 on the security of the joint and several bonds of himself, William Johnson and Sarah Johnson. Sarah Johnson gave a bond of indemnity to her husband. She, during the life of her husband, made her will according to her power, bequeathing all the property over which she had any disposing power. Her husband died in March, and she in September following, not having revoked or altered her will.

The bill was filed to subject her separate estate under

the settlement, together with the estate of her husband, to the payment of the bond of the plaintiff.

The Master of the Rolls, (Sir William Grant,) suggested a doubt whether the bond could affect the separate property of Mrs. Johnson, as by the settlement she appeared to have no power to appoint except by will, and he directed a re-argument.

Sir Samuel Remilly was counsel for the plaintiff, and he argued that the intention, as gathered from the settlement, was to authorize an appointment, both of the principal and interest, by deed in her life as well as by will, for the terms are if she should die without making any will or other disposition, and the effect of the whole was that the property was settled to her separate use.

The facts of this case would seem to be very strong against the power of the wife to appoint in any other way than by will, yet the Master of the Rolls, after taking the matter under advisement, made a decree in favor of the plaintiff, subjecting the estate of Mrs. Johnson to the debt.

The case of *Socketts vs. Wray*, referred to by the Master of the Rolls, was one where the wife had power to appoint the income or dividends only during or for life by deed, and after her death upon trust, &c., that the corpus should be transferred as Catherine Sockett should at any time during her life, by her last will and testament in writing, or any writing purporting to be her last will and testament, appoint. The Master of the Rolls in that case distinguished it from other cases cited, and held, as I think properly, that as to the interest she could dispose it for life, but as to the principal, she only could do so by a revocable act. I refer to this case to show that Sir William Grant, on his judgment in *Heatley vs. Thomas* subjecting the wife's property, places it on ground distinguishing that case from *Socketts vs. Wray*, where the language of the trust seemed explicit, confining the mode of appointment of the remainder to a will, or writing purporting to be a will, in express terms.

Counsel for Lively also respectfully suggests that he may have an opportunity to be heard on the question whether the mortgage from Mrs. Hayward to Hogue and wife was void, as declared in the opinion of the court, and to show that the mortgage was not a mortgage of the fee, but only of the rents, which were undoubtedly the property of Mrs. Hayward.

Counsel respectfully suggests that Mrs. Hayward was fully competent in law to convey her life interest, and to charge it for the debts of her husband; and that this was not in conflict or inconsistent with the terms of the deed of trust.

Chancellor Kent announced that "there is no doubt that a wife may sell or mortgage her separate estate for her husband's debts." 3 John. Ch., 143—4; 9 S. & M., 144.

Another point which counsel desires to call to the attention of the court, which did not arise in the argument of the case, because there was no contest between the two defendants, is how far the court will go in favor of the appointee of a power, who is a volunteer as against a creditor of the donee of the power, or one who has paid a valuable consideration for the property.

In this case Lively was a creditor as assignee of the mortgage, and also a purchaser for a valuable consideration from Mrs. Hayward; and it may here be said that as such purchaser, the failure of Mrs. Hayward to appoint (even if she had only power to appoint by will,) the remainder in his favor would operate as a fraud upon him, as he purchased under the full belief and under advice of counsel given to him and Mrs. Hayward that he was acquiring a right which would be sustained. Besides, as a creditor, where even the power can only be executed by will, where there is fraud intermingled, courts have gone to the extent of subjecting the property as against the appointee. There is no question that it will do so where the power is either by deed or will, for in this point there is no difference in any of the decisions,

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but it is also so held where the power is only by will, *where it is general*. On this point I commend to the court the case of Johnson vs. Cushing, 15 New Hampshire, 298. The able opinion of the court upon a review of other authorities announces the doctrine and effect of a general power, and shows that it is not determined by the mode of execution but upon its objects, and that the power being general though it is to be executed by will only if executed in favor of voluntary appointees, the court will subject the property in favor of creditors of the donee.

In view of the peculiar character of the questions which if the grandchild of Mrs. Hayward was contesting the right of Lively, would require consideration, and inasmuch as they were not discussed in the contest which the creditor of Richard Hayward created in their effort to subject as well the part of the lot conveyed to Lively, and the part appointed to the grandchild of Mrs. Hayward, counsel respectfully asks the court for permission to be heard upon them before the opinion of the court, as given in this case goes out as its final determination.

Of course counsel for Lively would be content if the opinion were to be modified to the extent of striking out, the court should so prefer, so much of it as affects the questions between the two defendants, leaving the judgment affirmance to stand as to the complainant, but modified to the rights of Lively.

On which petition, RANDALL, C. J., delivered the opinion of the court as follows:

The counsel of M. Lively have presented a petition asking that the opinion and judgment be modified so far as affects his rights in connection with the property in question. Upon this matter I will simply remark, that while agree to the conclusion that the plaintiff's bill be dismissed it is enough that the decision be placed upon the execution of the power by the making of the will of Mrs. Hayward.

As to the conflicting claims that may arise between the devisee under the will, and Mr. Lively under the deed of Mrs. Hayward to him, it was unnecessary and improper for the Circuit Court to decree that Mr. Lively's title was good, because the contest in this case was between Nalle & Co. and the defendants; and so far as the decree of the Circuit Court might be construed to determine the respective rights of Lively and the devisee, it should be reversed, and they should be left to try their titles as they may see fit.

This, I understand, to be the effect of the judgment of this court in that respect. It was not intended to determine their respective rights in this suit, as such an issue is not presented by the record.

The petitioner Lively insists that the opinion of the court pronounced by Mr. Justice Fraser is based upon an erroneous construction of the terms of the trust deed in respect to the execution of the power, so far as that opinion relates to the effect of the deed of Mrs. Hayward to Lively. It is sufficient to say in that respect, without expressing any dissent from that opinion upon the abstract proposition that a power to be executed by will cannot be executed by deed, the effect of the deed to Lively is not determined by the judgment of this court. Whether that deed is a proper execution of the power is an open question, depending upon a critical construction of the language of the deed creating the power.

The petition is therefore refused.

Buckmaster v. Kelley et al.

AMANDA BUCKMASTER, ADMINISTRATRIX, &C., APPELLANT
VS. GEORGE KELLEY AND OTHERS, RESPONDENTS.

1. It is not a valid objection to the competency of a witness produced on the part of the defendant that he had been the attorney of the plaintiff, and he may testify as to any facts except such as came to his knowledge by means of his confidential relations with his client.
2. Where a mortgage was given to secure a promissory note, payable in four months, and no suit brought until fully nineteen years after the note became due, and no proof that any portion of the principal or interest had ever been demanded, and the mortgagor having died, the note and mortgage not being found among his effects, and the administratrix, the widow of the mortgagee, never having had any knowledge of their existence, and there being no proof tending to show what had become of the note and mortgage, the administratrix not bringing suit until after this long time had elapsed on being informed that the mortgage was not cancelled of record upon answer of payment, *held*: that payment would be presumed on account of the lapse of time and other circumstances shown.
3. Upon foreclosure of a mortgage upon an undivided interest in lands, the court cannot make a decree of partition of the lands among the several owners and claimants.

Appeal from the Circuit Court for Duval county, Fourth Judicial District.

The opinion of the court contains a statement of the case by C. P. Cooper for Appellant.

The issues are as follows:

1. Payment or non-payment as a matter of fact, or legal and equitable presumption in each case.
2. Whether believing that they were obtaining perfect titles without actual personal notice, but with record notice will protect defendants in equity.
3. Whether plaintiff, if entitled to foreclosure in either case, or in both cases, is or is not entitled to foreclosure not merely on unimproved land but also to the improvements to the extent of her mortgage claims in the premises.

Plaintiff relies on establishing want of payment of either

of said mortgages on the fact that the record of both of said mortgages appears uncanceled. See certified copies of mortgages attached to original complaints and used in evidence before referee. Also statement of referee of examination of original record by him, and the want of cancellation confirmed. Also corroborating testimony of Mrs. Buckmaster, raising strong presumption of want of payment of said mortgages.

Absence of original notes and mortgages accounted for by Mrs. Buckmaster, at least presumptively, and sufficiently to allow certified copies to be used in evidence. *Thomp. Dig.*, 343.

Defendant relies on presumption of payment from lapse of time. The rule has been established that twenty years must elapse before that presumption can be raised, unless the usual course of dealing of the parties, or some positive act of the plaintiff himself, corroborates or confirms or creates the presumption. 2 *Green. Ev.*, par. 528; *Best on Pre.*, 187-8-9.

And even after the lapse of twenty years presumption of payment may be rebutted, for instance, by evidence of plaintiff's absence abroad, or other circumstances. 2 *Green. Ev.*, par. 290-1; 1 *Stark. R.*, 101.

"The principle on which presumption of payment arises from lapse of time is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule." 2 *Cranch U. S. S. C. R.*, 180, decision rendered by Chief Justice Marshall.

"No less time than twenty years will raise a presumption that a mortgage term has been assigned or surrendered." 5 *Taunton*, (1 *Eng. Com. L. R.*,) 170.

The presumption of a debt once proved to have existed is in favor of *and not against* its continued existence, unless payment or some other discharge be either proved or established from circumstances. *Best on Pre.*, p. 187, par. 137.

The equitable principle of presumption of payment from

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lapse of time is analogous to the statute of limitation, and is an artificial presumption based on the same legal fiction as the statute of limitation. See Best on Pre., p. 187, par. 137.

This being so, every impediment to the operation of the statute of limitation would be equally an impediment to the application and consideration of the equitable principle sought to be invoked by defendants. And the answer to all this is—

1. *Twenty years had not elapsed* from the accruing of the cause of action to the time of the commencement of suit.

2. The mortgagee moved to Georgia and died there many years ago, where his family have ever since continued to live, and are protected by the principle of "being beyond seas or out of the country," and of being under disabilities, having been a *feme covert* and minors, and the plaintiff now being the administratrix of an unsettled estate. Thompson Dig., 443-4.

3. A civil war continued for four years of the time when the courts were virtually suspended and the records inaccessible in Duval county, (of all which the court will take judicial cognizance,) preventing action on the part of the plaintiff in the premises.

4. The statutes of limitation in Florida were suspended by act of Legislature, approved December, 1861, and only revived in 1872. This suspension applied to the statutes of limitation affecting real estate. 14 Fla.

In the case at bar payment is not proven, and cannot be presumed, unless it can be established by Wheaton's testimony in the matter of the Kelley mortgage. Let us see—

1. Wheaton was an incompetent witness, having been of counsel for the plaintiff, and filed the original papers in both of said causes, including the original complaints, in which he alleged that no payments had been made.

Plaintiff's exceptions to the admission and consideration of his testimony should have been sustained. The court below erred in considering Wheaton's evidence. Green.

Ev., Sections 237-8-9-40, and case cited from 19 Vesey, 267, at bottom of last Section; Cooley's Con. Lim., 337; 11 Ga., 47.

2. Even if considered it proved nothing. He only testifies to seeing a paper *endorsed* to the effect that it was a mortgage from Kelley to Buckmaster, in the possession of Kelley after Buckmaster had removed from Florida. He never opened it and never saw its contents.

In many particulars his evidence conflicts with that of W. M. Ledwith and Mrs. Buckmaster, and with the power of attorney given him by Mrs. Buckmaster endorsed on the copy letter of administration, dated at the time he testifies to as having had the only interview with her, and conflicts with the allegations of the complaint prepared and signed by him as attorney, and filed in the Kelley case by him, and conflicts with the express statements of the Wooten mortgage, and is inconsistent with the facts. The time of alleged payment of the Buckmaster mortgage, and the date of said Wooten mortgage, show an interval of about two years, during which Kelley, according to Wheaton's testimony, must have kept the money designed for the payment of the Buckmaster mortgage, which is unreasonable, particularly with debts and even judgments pressing him in the mean time, as the testimony and record disclose, as is shown by Wheaton's own testimony and the copy of judgments in evidence, and the copy of deeds based on said judgments.

If his testimony amounted to anything in the case, his total want of credibility is indisputably established. Hence there is nothing left to hang the least showing upon that payment has been made in either the Kelley or Lambeth case.

On the second branch, namely: that the present occupants, the defendants Wallace and the representatives of Jed Frye, deceased, believed that they were obtaining perfect titles, and bought without personal notice of the Buck-

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master mortgages, although the existence of the mortgages recorded is conceded, will not protect them against the prior mortgage liens, and they bought subject to the principle of *caveat emptor*. Record is notice. Thomp. Dig., 180; 1 John. Ch. Rep., 394; 1 Story's Eq. Jur., par. 403; 2 ib., Sec. 850; 22 Howard's U. S. S. C. R., 325.

In all the authorities where it alleges that equity will protect *bona fide* innocent purchasers, who buy believing they obtain perfect titles, it will be discovered on examination that the belief must have been caused by action on the part of the plaintiff amounting to fraud, deceit or imposition. It is not a mere belief which the plaintiff has had no agency in creating, and which is the result of bad advice of defendants' own counsel or attorney, with the record accessible to him, as was the case here as shown by the testimony.

For this the plaintiff is not responsible. Being equally innocent, the plaintiff, being first in time, is first in right. "*Prior tempore potior jure.*"

Wallace and the Jed Frye heirs acquired title since the war. The purchases under which they claim, were made after the records were in the legal custody of the proper officials of the county, and easily accessible; hence, they have no excuse on the score of want of notice. Buckmaster's heirs were in another State, and did not stand by and see them buy, and throw them off their guard. Said Chief Justice Marshall in Rankin and Schatzell vs. Scott, 12 Wheaton, 177, "the principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claim."

This principle was recognized by the Supreme Court of Florida in Moseley vs. Edwards. 2 Fla. S. C. R., 434.

In Edwards vs. Moseley just cited, the Supreme Court of Florida decide that the lien of a judgment is not lost by the

expiration of a year and a day, the common law time for its enforcement, and that mere delay to sue out execution does not destroy the lien of a judgment.

By analogy the lien of a mortgage is not lost by mere delay to enforce it. In truth the similarity between a mortgage and judgment lien and liens of the same general character, is expressly noticed on page 434 of the case cited.

On page 435 of said authority, the case of Ridge vs. Prather, 1 Blackford's Indiana Reports, from page 401 to 405, is cited approvingly. "Ridge in that case pleaded that he was a *bona fide* purchaser without notice, after the expiration of a year and a day from the time of the judgment on the replevin bond, and before the issuing of the *scire facias*. Upon demurrer to this plea there was judgment for Prather, the plaintiff, in the Circuit Court, and this judgment was affirmed by the Supreme Court, after a full discussion and a thorough examination of the principles upon which it was founded." So say the Supreme Court of Florida.

The parallel between the case of Ridge vs. Prather, in several prominent particulars, and the case at bar, is too apparent and striking to need pointing out. Both are admitted prior liens—in one it is a *judgment* lien, in the other, *mortgage* liens.

1. In both the defence is delay to enforce the liens until legal or equitable bars intervene by lapse of time, and hence presumption of payment.

2. That the present occupants are *bona fide* purchasers for valuable consideration without notice. If the Indiana Supreme Court was correct in its ruling on these points in Ridge vs. Prather, and the Supreme Court of Florida in Edwards vs. Moseley, then the court below in the case at bar erred in its rulings.

On the third branch or issue, namely, was the plaintiff entitled to foreclose on the improvements as well as on the land, to the extent of the mortgage interest she represented?

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we assume the affirmative, and will argue it on the hypothesis, first, that the mortgage of a tenant in common only stands on as good a footing as the tenant in common, his mortgagor would have done in reference to his co-tenants in common, on the subjects of improvements made on the common and joint property without their knowledge and consent.

At common law one tenant in common has no exclusive right to improvements put upon the land by himself. 1 Wash. Real Prop., mar. pages 415 and 427; 1 Story's Eq. Jur., Sec. 653-5.

Equity will sometimes allow the tenant making improvements on joint or common property, either the improvements or the value of them, in the partition or division of the land, but this is controlled by strong equitable circumstances in every such case, and it is in contravention of the common law principle to the contrary, and in every case adjudicated, wherein this equitable principle has prevailed, it will be seen on examination that the other tenants in common have themselves been in direct fault, either by creating false impressions or by acts of fraud on their part, or something of that kind. Wherever the text books have stated the proposition broadly, that equity will grant to a co-tenant the improvements made by him on common property, it will be found on consulting the adjudicated cases, cited at the bottom of the very same page of said text books in support of the rule or proposition thus broadly stated, that the principle thus laid down is explained and modified and narrowed down in its application to cases in which equitable circumstances are to be found such as we have described.

Such will be found to be the case in 8 Price, 518; 1 Barbour, 500; 3 Paige, 470 and 546, and 1 John. Ch. 354, the standard cases cited by the text authors, (Story and others,) in support of the broad proposition laid down by them. In all these the improvements were made either

with the consent or the knowledge of the co-tenants, and sometimes with the avowed intention of those standing by and seeing the improvements going on of taking advantage of them. Hence these cases do not sustain the text, or at least only sustain it partially, and to a limited extent.

There are no facts or circumstances in the case at bar that make it a parallel one to either of those cited—no such equitable circumstances as characterize either or any of these are to be found here—so the equitable principle cannot attach to the case at bar, so as to except it from the common law rule. The common law principle or rule then must obtain in this case. In the case in 3 Paige, page 546, (which is a leading case,) the decision was put upon the ground of fraud, the tenant claiming part of the improvements, having stood by for seventeen years with the avowed purpose of allowing the other to make improvements, (the one making the improvements believing that he had good titles,) and then of taking the benefit of the improvements. And this case in Paige was decided upon the authority of *Wendell vs. Van Rensselaer*, (the case referred to in 1 John. Chan., page 354,) where a person having title to an estate allowed another to purchase and make great improvements, and kept his title secret for a great number of years, and was enjoined by Chancellor Kent from setting up his claim, upon the ground that *knowing* of the improvements being made and keeping his title secret, amounted to fraud.

In neither of these cases does there appear to have been any record of title. It is to be observed that the case of *Wendell vs. Van Rensselaer* does not concern tenancy in common, but that the party having title was not allowed to take the improvements on account of his fraudulent conduct, showing that the subsequent ruling in *Paige* was not based on any general rule or principle of allowing tenants in common for their improvements, but only upon the question of fraud in the particular case, and the general principle in

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equity that a party shall not be allowed to take advantage of his own wrong.

The case in 1 Barbour, page 500, was decided upon authority of that in Paige, and there the tenants joined together to build on the land, and one of them objected on account of the size of the house. By the decree of the court the tenant who built was allowed only so much as would have been the other's share of expense for building a house of the size agreed on between them.

It is true, that in the case just cited, the doctrine of allowing for improvements is laid down very broadly, but the case did not require it, and the broad rule, as therein stated, was not supported by the authorities cited by the Chancellor, and was not acted on by the court itself in the decree rendered, wherefore it was mere *dictum*.

If the property cannot be divided equitably, it may be sold by order of the court and the proceeds divided, or one party may be allowed owelty or a sum of money to make up his share. 1 Wash. Real Prop., mar. p. 427; 1 Story's Eq. Jur., par. 454.

But a mortgagee occupies a better position than a mere tenant in common in the matter of improvements. 8 Price, 518; 22 Howard's S. C. R., 325.

It is evident that the mortgagee does not stand entirely in the same position, or on the same footing as the tenant in common, his mortgagor, for the reason that on partition between tenants in common of the land, equity will decree a proportionate share of the rents and profits between the tenants in common, even as against the tenant who has had the exclusive possession, use and enjoyment of the land. See 1 Washburne on Real Prop., mar. p. 420, Sec. 14, and 1 Story's Eq. Jur., par. 655.

This would not necessarily inure to the mortgagee of one of the tenants in common on foreclosure of his mortgages, and could only be claimed by his mortgagor as one of the tenants in common.

Hence, the mortgagee being in a worse condition in this respect than his mortgagor, equity will protect him in his legal rights more rigidly in foreclosing his mortgage than it would probably have protected the tenant in common in the matter of partition of the land as against a tenant in common making improvements, the tenant in common having an advantage or benefit in the matter of rents and profits which the mortgagee would not and could not have had, and having a right to consent or object to the erection of the improvements, which he, as mere mortgagee, would not have had a legal right to exercise.

H. Bisbee, Jr., for Respondents.

When a party has been in possession of real estate supposing himself to be legally entitled to the whole premises, and has erected valuable improvements thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements. 1 Story's Eq. Jur., Sec. 655, 656; 3 Paige R., 546, 555; *ib.*, 470; 4 Abbott's N. Y. Dig., 288, No. 128; 3 Sand. Ch. R., 64; 1 John. Ch. R. 554.

The court, by its decree, will adjust all the equities of the parties, and, if necessary, give special instructions to the commissioners, and will nominate them. 1 Story's Eq. Jur., Sec. 656; 4 Barb. R., 228.

Equity has jurisdiction to decree a partition of real estate. 1 Story's Eq. Jur., Secs. 653, 658, 656; 10 Paige Ch. R., 473.

Payment of a mortgage security will be presumed after the lapse of twenty years without any evidence of payment at all. 1 Vol. Phil. Ev. mar. p. 675 and note 193; 12 Vesey, 266; 3 P. Wms., 396.

It is a rule established by courts of equity, and it is not necessary that the exact period of twenty years shall have elapsed; several months, or even one or two years, short of that period, may be sufficient. 2 McCord Ch. R. 435,

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439; 2 Wash. C. C., 323; 1 Vol. Phil. Ev., 678, note 193; 10 John., 381, 387; 1 Ill. R., 50; 7 Wendell R., 94.

This being the rule, the case of the appellee is peculiarly strong, for the plaintiff has not even the possession of the mortgage security, and there is testimony showing that it was in the hands of the mortgagor after maturity.

RANDALL, C. J., delivered the opinion of the court.

The appellant was appointed by the court of ordinary in Georgia in 1866 as administratrix of the estate of her husband, Edward J. Buckmaster, who died in that year, and brought two suits in equity in the Circuit Court of Duval county for the foreclosure of two several mortgages. One of the suits was upon a mortgage executed December 3, 1853, by George Kelly and wife to Buckmaster, to secure the payment of a note of Kelly of \$1,200, due four months after date, and covered an undivided one-half of twelve acres, upon which was a mill. In this suit Alexander Wallace, R. Dorman, R. Hicks and the heirs of Jed Frye and others were defendants. The other suit was for the foreclosure of a mortgage, executed by John E. Lambeth to Buckmaster, covering an undivided one-fourth of the same twelve acres, to secure the payment of two notes dated July, 1, 1854, for \$1,058.33, and \$1,128.33 respectively, due May the 1st, 1855, and May 1, 1856. Lambeth was the only defendant.

The first named bill was answered by Dorman, Wallace and the heirs of Frye. Wallace and Frye's heirs answered that they were in possession of the property as purchasers in good faith, and had purchased upon advice that the title was good, and allege that the mortgage and notes of Kelly were paid and satisfied. The suit upon this mortgage was commenced in April, 1873.

No answer was filed in the suit against Lambeth.

By stipulation of counsel the two suits were consolidated.

In the suit upon the Kelly mortgage the complainant

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prayed that the interest of Wallace might be partitioned and set off to him, together with his improvements. Wallace and others had built a mill on the property in place of the former mill covered by the mortgage, which had been burned before he purchased. They also pray for a partition before sale.

Upon the pleadings and testimony the court decreed that the Kelly notes and mortgage were paid and satisfied; that the undivided one-fourth, covered by the Lambeth mortgage, be sold to satisfy the Lambeth notes, and that commissioners be appointed to partition and set off the one-fourth, in severalty, to be sold.

From this decree the complainant appealed.

The defendants Wallace and Frye rely upon the lapse of time and other circumstances connected with the Kelly mortgage, as presumptive evidence that it is satisfied by payment. The note became due April 3, 1854, and the bill was filed April 15, 1873, being fully nineteen years. After the execution of the mortgage by Kelly to Buckmaster, Kelly, a short time before the money became due, to wit: February 26, 1854, executed another mortgage for \$3,738.50 to Mary L. Wooten, which latter mortgage was foreclosed in 1856, and Mrs. Wooten became the purchaser, and afterwards conveyed to Hicks, one of the defendants in this suit upon the Kelly mortgage. Wallace, in his answer, asserts that the Kelly mortgage was satisfied out of the money raised on the Wooten mortgage. The testimony discloses also that after 1853, Buckmaster removed with his family to Georgia, and resided there until 1866, when he died. Mrs. Buckmaster testifies that at some time after removing to Georgia, she heard her husband speak of his mortgages in Florida, including the Kelly and Lambeth mortgages, as existing mortgages which had never been paid, cancelled or foreclosed, and in connection had heard him say that the only mortgage he had in Florida, which had been paid or foreclosed, was one held against a house and lot of Mr. De-

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cottes. She remembers to have seen papers, among the paper and effects of E. J. Buckmaster, as late as about 1875 marked "Papers in the business of Buckmaster, Timanus and Kelly," or words to that effect, but never examined them. Since her attention was called in 1873 by F. J. Wheaton to the Kelly note and mortgage, the subject of this action, she has carefully and diligently searched for said papers, presuming the original note and mortgage were among them, but failed to find them, and therefore believe that they were lost or destroyed. There was no testimony showing that any interest had ever been demanded or paid on this note and mortgage, nor that any attempt had ever been made to foreclose or collect the money. Kelly left Florida after 1856. He and Timanus owned the former mill on the premises, and it is inferred from the testimony that Kelly, Timanus and Buckmaster were jointly interested in the mill, and that Buckmaster sold his interest to Lambert Wheaton testifies that in 1856 he saw the note and mortgage executed by Kelly, in Kelly's possession, in his Wheaton's office, in Jacksonville, where Kelly called to settle some rent with Judge Pearson, the note and mortgages being among Kelly's papers, though he says he did not open and read the mortgage, but saw the endorsement on the back of it. Mrs. Buckmaster testifies that Wheaton came to her to obtain permission to foreclose these mortgages, and did not intimate that either of them had been paid. Mr. Ledwith testifies that Wheaton, who commenced the suits as plaintiff's attorney, told him, on turning the suits into the hands of Cooper and Ledwith, that he knew of no reason why the money should not be collected on foreclosure.

The first question made by appellants is upon the admission of Wheaton's testimony, he having been plaintiff's attorney in the commencement of the suits, and afterward being a witness and attorney in behalf of the defendant Wallace and Frye. This general objection is not tenable.

There is no reason why any fact, material to the issue, may not be shown by either party by the testimony of an attorney on either side, provided the facts proposed to be proven were not obtained by him in the confidence of attorney and client. It is not shown in the testimony that Wheaton disclosed any material fact which was communicated to him in such confidence. His testimony, therefore, should be received upon the same footing as the testimony of other witnesses.

The next error alleged is, that the court found and decreed that the Kelly mortgage and note were paid and satisfied. Here it will be observed the period of nineteen years had elapsed after the mortgage debt became due before suit.

The doctrine, that after the lapse of twenty years a jury might presume a bond to be paid, was first laid down by Lord Hale, and in this he was followed by Lord Holt, who held that if a bond be of twenty years standing, and no demand proved, or good cause shown for so long forbearance on *soluit ad diem*, he should intend it paid. The same doctrine was afterward held by Lord Raymond, in the case of *Constable vs. Somerset*, (reported in 6 Mod., 22.)

In *Rex vs. Stephens*, 1 Burr., 434, Lord Mansfield says there was not any direct and express limitation of time when a bond should be presumed to have been satisfied; the general time, indeed, was commonly taken to be about twenty years; but he had know Lord Raymond to leave it to a jury upon eighteen years. And in *Hull vs. Horner*, (1 Cowp., 109,) he said the jury might presume the debt to have been discharged where interest did not appear to have been demanded or paid for sixteen years; but if a witness is produced to the contrary, as by showing the obligor not to have been in solvent circumstances, or a recent acknowledgment of the debt, the jury must say to the contrary. In *Darwin vs. Upton*, (2 Saunders R., 175, C.,) the same judge says, the jury may presume the debt to be discharged if no interest appears to

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have been paid in sixteen or twenty years. And in *Oswald vs. Leigh*, 1 T. R., 272, Lord Mansfield said there was a distinction between length of time as a bar and where it was only evidence of it; the former was positive and the latter only presumption, and that in case of a bond it might be eighteen or nineteen years.

Lord Ellenborough, in *Colsell vs. Budd*, (1 Camp., 27,) says there must be a lapse of twenty years, or a less time, with some circumstances to strengthen the presumption, and very slight evidence is necessary. The Supreme Court of New York, in *Clark vs. Hopkins*, (7 Johns., 556,) refused to allow a judgment to be entered upon a bond and warrant of attorney after the lapse of eighteen years.

The same court, in *Jackson ex d. Martin vs. Pratt*, (10 J. R., 381,) Kent, C. J., says, where no possession had been taken under a mortgage, nor any interest paid, nor steps taken to enforce it for nineteen years, it was held not to be a subsisting outstanding title, and that a jury might well presume it satisfied, without auxiliary circumstances.

In *Blake vs. Quash*, (3 McCord, Law R., 340,) the court held that *fourteen* years, without demand of payment, or interest paid upon a bond, the attorney of the obligee residing in the immediate vicinity of the obligor meanwhile, and the attorney having a reputation for vigilance in like cases, raised a presumption of payment.

DeSaussure, chancellor, in *Winstanley vs. Savage*, (2 McCord Chy., 438,) says: "The court is not exact as to twenty years. It is not a statutory provision, but an equitable application of the principle to cases long delayed. And if there have been great neglect and lapse of time, and great mutations of the property, the court will not lend itself to support such stale claims." On appeal the decree was affirmed for the reasons given by the chancellor.

The general rule has come to be settled that in a suit upon a bond, the lapse of twenty years without demand or payment of interest will raise a presumption of payment, and in

ordertorebut this presumption it must be shown affirmatively that the money has not been paid, and that if a long period, less than twenty years, has elapsed, some other circumstances must appear tending to the conclusion or raising the presumption that it has been paid; and there is no precise rule or quality or quantity of evidence prescribed. Each case must rest upon its own circumstances and address itself to the reason of the tribunal.

In the case at bar, we find that E. J. Buckmaster, the mortgagee, took a mortgage upon the undivided interest of Kelly in the real estate, to secure the payment of a promissory note of twelve hundred dollars, payable in four months after date. This was in 1853. The mortgagee was evidently a man of some business capacity, and was apparently careful in the conduct of his affairs. He received mortgages upon other real estate in the same locality for considerable sums—thousands of dollars. His mortgages were carefully drawn and placed on record. One, at least, of the mortgages was collected or foreclosed. Soon after the coming due of the Kelly note or mortgage, Buckmaster removed to Georgia, and we hear nothing more of the matter until a little over nineteen years afterwards the administratrix of the mortgagee is informed by Judge Wheaton that the mortgage is of record and not cancelled. Forthwith she sets about searching for it among the papers of the deceased and fails to find it or any trace of it. She then remembers that she had at some time after her husband's death seen a paper or papers marked, "Papers in the business of Buckmaster, Timanus and Kelly," or similar words. She had never opened them, for she does not know what papers they were. As Buckmaster, Timanus and Kelly had formerly had business transactions together, we cannot necessarily presume that this package contained a note and mortgage given by Kelly to Buckmaster. It is not shown that Buckmaster in his lifetime, took any especial care of these papers, and the administratrix, during seven or eight years of her administration

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after her husband's death in 1866, has not seen, known or heard anything of such note and mortgage, nor had she ever seen them, so far as she shows by her testimony. She does not say that she had ever seen them either before or since her husband's death. Her testimony is given in such manner that she is evidently a person of intelligence and business capacity. She had an attorney living near her in Georgia, with whom she and Judge Wheaton conferred in 1873. It seems exceeding strange that Mr. Buckmaster, between April, 1854, when the note became due, and 1866, when he died, should have held notes amounting to thousands of dollars past due, (which, by law, would be barred by the statute of limitations long before the late war,) and never taken any steps to collect either principal or interest, or that some time during that period his wife should never have seen them if they were in existence, or that she had never heard of any efforts to collect the money. And it is quite as strange that from 1866 to the present time, while she has been the administratrix of the mortgagee, and having his effects in her possession, she has never found any such papers or any memorandum relating to them even to prompt her to make inquiry into the matter with a view to protecting herself and her family and enjoying the fruits of a collection. She says in her bill, and reiterates in her testimony, that the note and mortgage have never been in her possession, and are lost. However honestly she may make this declaration, we can scarcely realize how she can safely aver that they are "lost," if she has never seen them and has no evidence of their existence; but the best evidence of their non-existence is the fact that her husband left no such valuable papers among his effects, so far as she knows. It is true that she says that some time during his life-time she heard her husband "speak of his mortgages in Florida, including the Kelly and Lambeth mortgages, as existing mortgages, which had never been paid, cancelled or foreclosed;" (language more like that of a lawyer than of a woman,) and

as administratrix, she has made no effort to enforce this mortgage, which she says her husband spoke of as having "never been paid, cancelled or foreclosed." As a prudent woman, so reminded by the recollection of her husband's words, and aided by counsel, she would have done something towards ascertaining the condition of this important matter. As a prudent man, Mr. Buckmaster would naturally have taken some steps towards collecting this money, if it had not been paid, especially as it appears the money was to be paid in a short time (four months) from the date of the note; and especially also, considering that the mill then upon the premises was afterwards burned, and the value of the property thereby greatly diminished, thus also hazarding the prospect of collecting the enhanced amount of interest added to the principal, the maker of the note having, also, as appears, gone to parts unknown after the year 1856.

The most plausible, and indeed, under all the circumstances, the only reasonable solution is, that the Kelly note was paid. And the fact that Kelly, a very short time before the note became due, executed a mortgage upon the same moiety of the property to Mrs. Wooten for a larger amount, strengthens the answer of Wallace, and the testimony of Judge Wheaton, in his impression that the Buckmaster mortgage was paid off out of the proceeds of the mortgage to Mrs. Wooten, and that Judge Pearson (who collected a claim for rent against Kelly) was the attorney for Mrs. Wooten, and also the attorney for Mr. Buckmaster generally in his business. "From the tone of the conversation," Wheaton says, "I was led to believe that a portion of the money borrowed by Kelly from Wooten was used in payment of the Buckmaster mortgage, Pearson representing Wooten in relation to that mortgage," and "Pearson represented Buckmaster generally in his business."

Counsel for appellant insist that Wheaton, having been contradicted by Mrs. Buckmaster and by Mr. Ledwith in regard to conversations had with them while Wheaton was

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attorney of Mrs. Buckmaster, is not a credible witness. It is unnecessary to discuss this question. The conclusion that this mortgage debt is paid is arrived at independently of Wheaton's testimony, but the circumstances detailed, as we have said, go to strengthen the theory that it was paid out of the proceeds of the Wooten mortgage, that having been executed a short time before the Buckmaster money became due, and as the Kelly note to Buckmaster was on short time, the strong probability is that it was expected to be promptly paid, and as we never hear more from Buckmaster on the subject, the conclusion is legitimate that he received his money when he expected it. The note and mortgage are not produced in evidence, nor is there proof of their loss or their absence accounted for by the complainant otherwise than by showing that they are not and never were in her possession, and that she never had any personal knowledge of their existence.

Mr. Justice Sutherland, delivering the opinion of the court in *Jackson ex dem. vs. Sockett*, (7 Wend., 94,) says that the statute of limitations having run on the note, and that statute being founded in part, at least, or, he might say, principally upon the presumption of actual payment and the difficulty of proving it from lapse of time, though secured by mortgage, the jury may properly conclude payment, the mortgage not containing any covenant to pay, but being merely a security. This was concurred in by those eminent jurists, Chief Justice Savage and Justice Nelson. Without fully endorsing this doctrine, which has not been sanctioned in some other States, (see *Belknap vs. Gleason* 11 Conn., 160,) it is a strong argument that the note nineteen years over due has been paid.

The third ground of error is, that the court decreed that a partition be made of the premises, and that one-fourth of the twelve acres, by admeasurement, be sold to satisfy the Lambeth mortgage, which is a mortgage of an undivided one fourth. The complaint upon the Kelly mortgage

prays, among other things, that partition be made of Wallace's interest, and that it be set off to him, and the parties in that suit stipulated and agreed that the premises could be partitioned without inconvenience or injury. There is no prayer, however, for partition in the bill of complaint upon the Lambeth mortgage, and there is no answer in the suit against Lambeth.

We do not see how it is practicable in this suit, brought to foreclose a mortgage, to make a partition. A suit for partition should not be joined with one for a foreclosure. The manner of proceeding in the suits is entirely different in the matter of process, parties, pleadings, issues and decree. There are cases in which a decree should direct portions of an entire mortgaged property to be first sold in order to save equitable interests, as where a part of the property has been purchased from the mortgagor subsequent to the execution of the mortgage, and this is a very familiar rule. The bill is defective as for a partition, because it fails to show who are *all* the parties interested in the entire tract of land, and so does not lay a foundation for a final decree of partition. The decree binds only the parties before the court. All the parties interested in the estate are necessary parties in partition, and it is very evident that in foreclosing a mortgage upon an undivided share, the court cannot determine the rights of all the parties in the whole. Some of the defendants in this suit are even at issue between themselves as to their titles.

This suit was brought while the "code of procedure" was in existence, but it will be found that such a joinder of causes of action is not provided for. (See § 117.) The provision of the code on this subject is substantially a repetition of the ancient rule. The practical difficulty is that the court cannot determine in one proceeding all the issues that must legitimately arise in both causes. The remedy by partition should precede the sale on a decree of foreclosure

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or follow it. The consent of the parties to join these incompatible causes of action cannot avoid the difficulty.

It is claimed that Wallace and other defendants have erected valuable mills upon the land, having purchased under the belief and upon legal advice that their title was good, and therefore they ask the protection of the court. There need be no difficulty about this matter. The partition preceding the foreclosure would doubtless have thrown the mortgage upon that portion set off to the mortgagor, and after foreclosure and sale the purchaser would stand in the right of the mortgagor as a tenant in common with other owners. If there be parties who have made valuable improvements upon portions of the property which may be set off in a partition, under circumstances which entitle them to protection, the court of equity will protect them. (1 *Hilliard on Mortgages*, 13; 10 *John. R.*, 414; 1 *Barb. R.*, 500; 2 *Sandf. Ch. R.*, 98.)

The joinder of two causes of action upon the two mortgages, by the consolidation of the two suits, is somewhat anomalous. The mortgages are given by different parties, upon different shares or portions of the property; the parties defendants in the suits have no common interests. There are several necessary parties in one case, and but one in the other. As the parties have consented to the consolidation, however, we leave them as we find them.

The decree of the court as to the Kelly mortgage is affirmed, except that if the mortgage be cancelled of record it should be done by an order directing the clerk to enter the cancellation. The decree as to the Lambeth mortgage is affirmed, except as to the proposed partition. The cause is remanded, with directions to the Circuit Court to reform the decree in accordance with this opinion. Each party will pay one-half the costs of this appeal, no costs besides disbursements to be included.



**THE STATE OF FLORIDA, THE TRUSTEES OF THE INTERNAL
IMPROVEMENT FUND, ET AL., VS. THE JACKSONVILLE,
PENSACOLA AND MOBILE RAILROAD COMPANY, ET AL.**

- 1- Representing as attorney a third person not a party to a suit in proceedings against a receiver in said suit, does not disqualify such person from hearing as judge the case between the parties, when the equities of such case are independent of the rights and not connected with the case of such third person.
- 2- Where in an amended complaint a corporation is named a party by the plaintiff, and upon its motion it is ordered to be made a party defendant, both the plaintiff and defendant being heard upon the motion, it is too late to insist that the defendant should have intervened under the original complaint by petition to be examined *pro interesse suo*. The only question, under these circumstances, is whether this party has or claims an interest in the controversy adverse to the plaintiff, or is a necessary party to a complete determination or settlement of the questions involved.
- 3- Under the code, an amendment of a complaint relates back to the commencement of the action.
- 4- It is not necessary that a party defendant should be served with process before entering an appeal from an *ex parte* order or judgment affecting his rights, if such order or judgment is the proper subject of an appeal.
- 5- An appeal from a final judgment under the code, when the judgment is substantially a decree in equity, brings up the whole merits of the cause and the previous proceedings generally.
- 6- Where facts material to the plaintiff are embraced in the issues made by the pleadings of the defendant, it is error to enter a final decree for the plaintiff without evidence, without a hearing, and without a default. So also is it error to make a final decree against a defendant upon the allegations of a complaint and *ex parte* affidavits, without service of process, without notice, and without opportunity for hearing.
- 7- A supersedeas operates to suspend the action and power of the inferior court in the matter appealed from.
- 8- A defendant cannot, through the process of injunction, be prevented from appealing in a case where, under the Constitution and laws, he has a clear right to appeal, nor should a perpetual injunction be granted without notice or hearing, which in effect determines rights involved in the issues in the cause.

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9. Where a corporation is a party, it is only necessary to bring the corporation into court by service of process upon such officers as the statute directs. Subordinate agents, employees or officers are not proper parties.
10. As a general rule, a receiver appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject matter by the same court in a subsequent suit. The receivership in the first suit should be extended to the second, subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receiverships were granted. If, however, a different receiver is appointed, then, if the court has jurisdiction of the subject matter and parties, and is the same court which made the first appointment, the receiver in the first suit must deliver to the receiver appointed in the second.
11. A mortgagee has no equitable rights growing out of his mortgage lien to have a receiver of the estate of the mortgagor beyond the property embraced in the mortgage. The receivership should not be extended to other property in the possession of and claimed by third persons.
12. Where no serious injury to the property involved in the controversy can result from the delay, notice should always be given before a receiver is appointed. A case of great urgency should be made to appear to justify such an appointment without notice, and wherever an injunction or restraining order is sufficient to protect the rights of the plaintiff, no receiver should be appointed. The appointment of a manager of a line of railway is an extraordinary exercise of power. Such appointment should be made only in extreme cases clearly justifying such action.
13. Under the Constitution and laws of the State of Florida, a receiver cannot be appointed by the judge of one circuit to take possession of property in another.

This is an appeal from a judgment rendered by the Circuit Court for Duval county. The court, in the determination of this case, decided nothing as to the merits of the controversy. The points decided are mostly matters of practice and sufficient of the record is given in the opinion of the court to show the manner in which the questions arose.

Chief Justice Randall and Mr. Justice Van Valkenburg being disqualified, Judges Goss and Bryson, of the Fifth and Third Circuits, were called to sit with Mr. Justice Wecott in the cause.

M. D. Papy for Florida Central Railroad Company.

Reserving for the present the question as to the regularity and validity of the appointment of a Receiver *ex parte* and without notice, for consideration hereafter, I proceed in the first place to discuss the question of the alleged consolidation of the Florida Central with the Jacksonville, Pensacola and Mobile Railroad, which is prominently put forward in the complaint and upon which the plaintiffs seem to base much of the equity they assert.

The complaint alleges and the law of the State confirms it, that the Florida Central Railroad Company was incorporated in the year 1868. The act of incorporation, which is the fundamental law of the company, contains no provision authorizing a consolidation. It is not denied that the Legislature may, by subsequent act, confer authority for that purpose; but it is insisted that an enabling act is essential, for without it railroad corporations organized separately "could not merge and consolidate their interests." Such enabling act, however, must be of a character not to impair the rights of any stockholder already acquired, and hence a provision which permits consolidation by a majority *only* will not be upheld so as to bind or affect the rights and interests of a minority.

The Legislature in 1869 passed the act to Perfect the Public Works in this State, the fourteenth section of which made it lawful for the several companies owning the roads or parts of roads from Quincy to Jacksonville, &c., by a vote of the owners of a *majority* of the stock interest, and with the consent of the owners of a majority of the stock in interest of the Jacksonville, Pensacola and Mobile Railroad Company, to consolidate with the latter company so as to become one corporation under its name.

It also provides that with like consent, "without such consolidation they are authorized to make such arrangements with reference to a common management and schedules as may be agreed on."

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The inquiry at once presents itself, could the Legislature thus authorize a *majority* in interest of the stock of the Florida Central Railroad Company to consolidate with any other company, and the result of the inquiry will be found to be that no such power exists; that the act is in violation of the Constitution, which preserves all contracts and condemns all attempts to impair them.

Investigation of this question must lead to the conclusion that in the United States there can be no consolidation of the rights, privileges and franchises of two distinct corporations without the *unanimous* consent of all the stockholders, because it would impair the obligations of the contract which a shareholder enters into when he becomes a member of the corporation.

The Supreme Court of the United States have placed this subject beyond doubt in their decision in the case of *Clearwater vs. Meredith*, in which, whilst they admit the power of the Legislature to confer authority to consolidate, and declare that without it "railroad corporations separately organized could not merge and consolidate their interests," they proceed to say, that "in conferring the authority, the Legislature"—in that case—"never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested an obvious purpose to do so, *the act would have been illegal*, for it would have impaired the obligation of a contract."

Again: "When a person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character at the will and pleasure of a majority of the stockholders, so that new responsibilities, and, it may be, new hazards are added to

the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit." (Clearwater vs. Meredith, 1 Wall., 39-40.)

See also the following cases, which show that no fundamental change can be made without the consent of all the stockholders: 6 Ohio, 119; March vs. Railroad Company, 43 N. H., 525-6; Stevens vs. Rutland and B. R. R. Co., 3 Vermont, 545, appendix.

Tested by the rule thus authoritatively settled, which will be found to be supported by the other authorities, the act of the Legislature of 1869, so far as it may be regarded as manifesting an "obvious purpose" to authorized consolidation by the vote of a majority, was and is "illegal," because coming under the constitutional inhibition referred to.

If it is insisted that the public have such an interest in railroads that the Legislature may provide for the consolidation of different lines by authorizing a prescribed majority to effect it, I then maintain that this can only be done by virtue of the right of eminent domain existing in the State; and when it is attempted to exert the power in condemning the minority stock, provision must be made in the law itself for just compensation to the dissentient stockholders, and that without such provision the act would be unconstitutional.

Chancellor Kent, in *Gardener vs. Village of Newburgh*, felt "bound to conclude that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property." (2 John. Ch., 167.)

I do not, however, believe that the Legislature contemplated the deprivation of any individual stockholder in any of the corporations, but that the act was simply permissive, and only intended to manifest the consent of the Legislature to the act of consolidation, without any purpose to affect the

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rights of any one. So that if consolidation is accomplished in the only way in which it could be done, viz.: by the consent of all the stockholders, it could not be said to be void because by the act referred to the State consented to it.

It follows from these principles:

First. That the vote of the majority could not consolidate.

Second. That the act could not confer such power on the majority, and the attempt to do so is illegal.

Third. That if it is sought to sustain authority by virtue of the right of eminent domain, the act is unconstitutional, because wanting in the "indispensable attendant" of a provision for due compensation.

Fourth. That the consent of all the stockholders is necessary.

This review of the law would seem to settle the question, unless it can be shown by proper averments that the necessary action has been taken by the stockholders of the Florida Central Railroad to consolidate their road with the Jacksonville, Pensacola and Mobile Railroad. Such consolidation is not to be presumed, for the assent of the stockholders to any fundamental change cannot be presumed but must be proved, and to be proved must be averred. (March vs. Railroad Company, 43 N. H., 525-6.)

It being shown to be essential and that all the stockholders should assent to consolidation to make it effective and legal, let us inquire if the allegations of the complaint are sufficient to justify the conclusion that the Florida Central Railroad Company ceased to exist by merger into the Jacksonville, Pensacola and Mobile Railroad Company.

Nowhere, either in the original or amended complaint, is there to be found an averment that the assent of the stockholders was given to consolidation. The allegation that the two companies consolidated, is unaccompanied by any statement showing how, when or in what manner the alleged consolidation was effected. There are many averments

which, if they do not contradict, at any rate make consolidation a very doubtful fact upon the very face of the complaint, and with the view of giving it support we find it stated as among the evidences that consolidation took place, that the Jacksonville, Pensacola and Mobile Railroad Company was in possession of the Florida Central Road—was operating it as one line with its own—had its principal offices at Jacksonville, and that Littlefield was President of the whole line, and had made and filed a certificate with the Governor that the whole line of road owned by the Jacksonville, Pensacola and Mobile Railroad Company was two hundred and fifty miles. This is stated in the original complaint on information, and no copy of the original certificate is furnished, though the State is a party plaintiff, to whose Governor it was, it is presumed, delivered.

I have shown that the assent of all the stockholders was necessary. Do any or all these allegations show that such assent was given? We affirm that they do not.

First. Because by the terms of the law itself the companies, without consolidation, were authorized to make such arrangements with reference to a common management and schedules as might be agreed on. (Section 14, act of 1869.) Hence all allegations in regard to common management and operation by the Jacksonville, Pensacola and Mobile Railroad Company afford no evidence of consolidation, because consistent with the law and the separate organization of each.

Second. Because one company, without the authority of the act aforesaid, might by agreement carry on the operations over the whole line, and it has been held that one company associating, allying and connecting itself with another in regard to traffic in which they have a common interest, does not amount to an amalgamation between the two companies. (2 Redfield, 590.)

Third. Because the certificate alleged to have been given by Littlefield, as President of the Jacksonville, Pensacola

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and Mobile Railroad Company, can have no binding effect on the Florida Central Railroad Company, unless perhaps it could be established that its terms were known to the latter company and they assenting to it, with an understanding as to its effect upon the rights of its stockholders.

The fact that the exchange of securities was made with General Littlefield establishes nothing to the point, because by the law the exchange was only authorized to be made with the Jacksonville, Pensacola and Mobile Railroad Company, of which General Littlefield was President, even for bonds of any other company which might be tendered under the provisions of the fourth section of the act of February, 1870.

It is maintained, however, that the allegations of the complaint negative the suggested consolidation, and I refer to the many averments in regard to the stock of the Florida Central Railroad Company which could not exist if the company was extinct, and which is prayed in the original complaint to be seized by the Receiver with power to hold and vote the same, and finally that it should be sold by the Receiver under the order of the court. The original complaint also admits that the Florida Central Railroad Company kept up at least a mere formal organization of a Board of Directors. No such organization could have been kept up if amalgamation had taken place, for in such event all authority for such purpose would have ceased.

The amended complaint alleges, on information and belief, that prior to the issue and exchange of bonds, Littlefield had full consultation with parties named and other stockholders, constituting nearly all of the stock interest in the Florida Central Railroad Company, in relation to said exchange, and that full assent was given thereto. Here we have a concession that all the stock interest was not present, because it is alleged that the consultation was with nearly all. But if it had said *all* it could not alter the case, because the bonds of the Florida Central Railroad Company,

which it is said were tendered to the Governor in exchange for State bonds, might have been well issued, as provided for in the fourth section of the act of 1870, without consolidation, and could only have been issued and have been received by the Governor as the bonds of an independent and separate organization. It cannot be successfully maintained that the bonds of the Florida Central Railroad were or could be the bonds of the Jacksonville, Pensacola and Mobile Railroad, either in fact or by any construction that can be given to the law which authorized their issue. By a reference to the fourth section of the act of February, 1870, it will be seen that its provisions not only contemplated but authorized an exchange of bonds of the State for bonds of any company owning part of the line between Quincy and Jacksonville, in aid of the Jacksonville, Pensacola and Mobile Railroad Company, in addition to the bonds of the latter company itself, for the exchange of which for State bonds provision is made in the second section of the same act. If this is not the correct view to be taken, then the fourth section is wholly inoperative, and the State was not authorized to receive any other bonds than those issued by the Jacksonville, Pensacola and Mobile Railroad Company itself. If, on the other hand, the Jacksonville, Pensacola and Mobile Railroad Company was required to own the entire line to Jacksonville, its own bonds under the terms of the second section would have been all that was necessary, and the fourth section would not have been adopted, for it would have been useless. The fact that the bonds of the Florida Central Railroad were accepted in exchange for State bonds, as alleged, at once overthrows all averments which are supposed to establish consolidation. But the amended complaint goes further, and admits that at the time of the exchange of securities it was discovered that all necessary steps to continue a *pro forma* consolidation had not been taken. That the exchange of the securities was made by and in the name of the officers of the Jacksonville,

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Pensacola and Mobile Railroad Company cannot affect the question, for those officers were the only ones with whom, by the law, the exchange could be effected, whether the bonds offered were those of one company or of both. When, then, were the necessary steps taken, if at all, to constitute a *pro forma* consolidation? The complaint does not inform us, but there are to be found in it many evidences that such steps were never taken, for it is alleged that Houstoun assumed to be the owner of a majority of the stock and had held meetings of the stockholders, claiming that the Florida Central was no part of the Jacksonville, Pensacola and Mobile Railroad, and that it was an independent road in every respect.

But in addition to this we have the allegation that E. M. L'Engle, who claimed to be a stockholder in the Florida Central Railroad Company, had filed a bill and had procured a Receiver to take charge of the road; all which allegations tend irresistibly to establish the positive dissent of at least some of the stockholders to the suggested consolidation. The prayer of the amended complaint to make the Florida Central Railroad Company a party concedes its existence as claimed by those referred to in the body of the bill, and at all events the fact that the road was in the possession of a Receiver at the instance of one of the stockholders of the company negatives the idea that the assent of all the stockholders was given to consolidation, without which consent, as has already been shown, it could not legally be effected.

If these allegations do not disprove consolidation by the assent of the stockholders, the absence at least of any averment that it was accomplished by the consent of all, leaves the question, so far as appears on the face of the complaint, to the only presumption which the law authorizes, viz.: that it was not done at all.

But conceding, for the sake of argument, that the bill makes a *prima facie* case for relief, it certainly does not

for a Receiver, because it is wanting in the necessary allegations to show imminent danger if the possession is not taken by the court, and assuredly is there the absence of everything, as well in the allegations as in the nature of the property, to justify the appointment of a Receiver *ex parte* and without notice.

In *Blondheim vs. Moore*, 11 Maryland, 364, (a leading case,) it is said that the authorities upon the subject establish the following propositions:

1. That the power of appointment is a delicate one, and to be exercised with great circumspection.

2. It must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a Receiver is necessary to preserve the property.

3. There is no case where the court appoints a Receiver merely because the measure can do no harm.

4. Fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved.

5. Unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application.

See also 1 Maryland Ch. Rep. 70; *Lloyd vs. Passingham*, 19 Ves., 59.

In the case of *Verplanck vs. Mercantile Insurance Company of New York*, (2 Paige Ch. Rep. 450,) the court says: "Another fatal objection to the regularity of these proceedings is that the appellants were deprived of the possession of their property, and divested of all their corporate rights, without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a Receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or cannot be found, or where for some other reason it be-

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comes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of property. Formerly it was never done until after answer."

Again:

"In every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition, on which such application is founded. Oglevie's affidavit in this case, that he was satisfied of the necessity of such a proceeding, was not sufficient. He should have stated the facts on which his opinion is based, to enable the court to judge of its correctness."

See also the case of *The People vs. Norton*, (1 Paige Ch. Rep. 17,) where the rule is laid down and the circumstances under which a departure from it is allowable. (*Trubert vs. Burgess*, 11 Maryland, 456; *Haight vs. Burr*, 19 Maryland, 134; 13 Florida, 359.)

In view of these authorities and the principles therein announced, the order for a Receiver was erroneous, and should be reversed, because granted *ex parte* and without notice. The Florida Central Railroad Company was, by the amended complaint, asked to be made a party, and as the allegations showed that it was claimed to be an independent organization asserting rights, it was entitled to notice, and an opportunity of being heard.

It is objected that the order for a Receiver granted on filing the original complaint was never revoked, because it is not competent to do so except by order in the identical case in which it is granted.

If this proposition were true, it would be impossible for a Receiver to be displaced at the instance of a person not a party to the original record, however much he might be entitled to it by the exigencies and justice of his case, and th

court could be made the instrument of wrong without the power of relieving itself. Surely the same court that appoints is competent, in a proper case and with the proper parties before it, to displace a Receiver, though the order may be made in a different cause, otherwise it might be emasculated of its powers by the mere form of proceedings. In any proper case, which shows that its order for a Receiver over a given subject was improper, it is not seen that there can exist any principle to prevent it from displacing its own officer. The Receiver is not the officer of the case in which he is appointed, or of the parties, but he is the officer of the court that appoints him. Hence, whenever the court of which he is an officer adjudges that he is improperly in charge of property to which a third party has better rights, the power to displace him must surely reside in the tribunal from which he derives his existence. How else, it may be asked, could the court act, whenever it appears that as against all the parties in the original cause, a third, having a prior or superior right, is entitled to such displacement? As a fact, Mr. Greeley was by order removed or displaced as Receiver of the Florida Central Railroad by the same court that appointed him, and the test of the power of the court was to be found in its ability to enforce it upon its own officer. The citation from 2 Wallace, 632, does not controvert this proposition, but on the contrary, it is believed that it sustains it. As well may we urge that the order removing Baker and restoring Greeley was void, because not made in the case in which Baker was appointed. Where would this argument end? The case in 2 Wallace decides, it is true, that the District Court of Wisconsin, not having power to make the orders referred to, the property was in contemplation of law still in the hands of the Receiver. But it will be seen by reference to that case that the court was considering and denying the jurisdiction of the District Court to exercise any power at all, because, by act of Congress, its powers had been transferred to the Cir-

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cuit Court, and they proceed to say that as to the citizenship of the parties, the Circuit Court, whose Receiver was in possession of the property, was the proper tribunal where litigation concerning such possession must take place, in contradistinction from a State Court, where the jurisdiction as to the parties was alleged to exist. The case which went up to the Supreme Court was not the same case in which the Receiver was appointed, but it was in the same court. I admit that a Receiver in possession cannot be disturbed without the leave of the court, but surely the court itself, in any proper case before it, may act so as to relieve and displace him by the appointment of another.

In 2 Daniel's Ch., page 1433, we find that "a Receiver appointed over property which is in possession of another Receiver, ought to obtain the special authority of the court to recover the property." This citation is given to show that there must be instances in practice where such appointments are made. Where the same court displaces one and appoints another, the authority to take on the one hand and to surrender on the other is complete and involved in one and the same order. The order appointing Greeley in the first instance being revoked, and he being displaced by the order appointing Baker as to the Central Road, his power over that road was gone, and he could not repossess himself of this road unless by a new order, which was accordingly sought for and obtained by the plaintiffs in this case.

The complaint does not allege the order appointing Baker to be void, but seeks to vacate it, and the plaintiffs are bound by their own allegations and the legal results that flow from them.

Even in regard to different courts, the principle that the court first obtaining jurisdiction of a cause has a right to decide every issue arising in its progress, is subject to various modifications and limitations. Thus in the case of Buck vs. Colbath, 3 Wall., 345, the Supreme Court of the United States, referring to this rule say:

"At the same time it is to be remarked that it is confined in its operations to the parties before the court, or who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided. This limitation was manifestly in the mind of the court in the case referred to (meaning Freeman vs. Howe, cited in the opinion) for the learned judge who delivered the opinion goes on to show that the persons interested in the possession of the property in the custody of the court, may, by petition," (as the Central Railroad Company did in this case,) "make themselves so far parties to the proceedings as to have their interests protected, although the persons representing adverse interests in such case do not possess the qualification of citizenship necessary to entitle them to sue each other in the Federal Courts. The proceeding here alluded to is one unusual in any court, and is only resorted to in the Federal Courts in extraordinary cases where it is essential to prevent injustice by an abuse of the process of the court which cannot otherwise be remedied. But it is not true that a court having obtained jurisdiction of a subject matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same questions exactly."

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, character of the relief sought, and the identity of the parties in the different suits."

After giving an illustration of the rule where the parties are the same in three different courts, they proceed to say:

"The limitation of the rule must be much stronger and must be applicable under many more varying circumstances when persons," (like E. M. L'Engle, for example,) "not parties to the first proceeding, are prosecuting their own separate interests in other courts."

It will thus be seen that the exclusive right of the court

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having first obtained jurisdiction, as against any *other court*, is subject to limitations and modifications in favor of persons not parties to the first proceeding, and that it is not true that the first court can exclude all others, under the varying circumstances which limit the application of the principle as announced in the decision quoted.

But the suit of E. M. L'Engle was in the *same*, not another court, and the order displacing Greeley and appointing Baker was made by the same and not another tribunal that originally appointed the former. As Baker was in possession and Greeley displaced by order of the same court that appointed Greeley originally, how can it be said that the possession of the property by the court was disturbed when Baker, the new Receiver, acted under its own order; and upon what principle, it may be asked, can it be maintained that the order displacing the one and appointing the other is void when made by the same court, though in a different case, and as we must presume, with proper parties before it? The court itself was acting on its own possession by transferring it from one officer to another, and if there was error in this, it was subject to revision on appeal.

It follows, therefore, that the order of the Circuit Court of Duval county displacing Mr. Greeley and appointing Mr. Baker was legal and valid, and that the right of Mr. Greeley under his original appointment was revoked and ceased to have any validity as to the Central Railroad; that it required a further order to reinstate him as Receiver, and such further order having been obtained, is the only one which could confer authority on him, and therefore is the only order from which the appeal could have been taken.

Right of Florida Central Railroad Company to appeal.

Having been made a party defendant in the amended complaint upon which the order of 22d June was granted *ex parte* and without notice, the appellant was not bound to wait for process to be served, but on being informed of

the filing of the complaint, was entitled to appear before service, which is called appearing *gratis*. 1 Dan. Ch. Pr., 560; 1 Smith's Ch. Pr., 158; 2 Maddox's Ch., 201; Waffle vs. Vanderheyden, 8 Paige, 45.

Upon appearing *gratis*, a defendant may plead or answer, to take any other legal steps for the protection of his rights, as if he had been served with process; and now that the statute allows appeals from interlocutory orders such as the one granted in this case, and a supersedeas to the same, he is as much entitled to an appeal as if he had been regularly served, for otherwise he would be deprived of the benefit of this right by the very irregularity of which he complains.

The case of Swepson *et al.* vs. Call and Baker, 13 Fla., 337, is one where an injunction was granted and a Receiver appointed *ex parte* without notice, and in which an appearance *gratis* was made, an appeal taken, and supersedeas obtained suspending the order, and restitution awarded pending the appeal. The appeal in that case was sustained and the order of the court below reversed.

In this case, before the Receiver obtained possession under the order, the appellant appeared, was admitted a party, took its appeal, and obtained a supersedeas.

It fully appears, then, that the appellant was an actual party, made so by the prayer of the amended complaint itself, as well as by the order of the court, and therefore entitled to the right of appeal, to the same extent as any other party in the cause.

In 1 Barbour's Chancery Practice, 382, it is laid down that "it is not necessary that the person who appeals should be actually a party to the record, provided he has an interest which may be effected by the decree or order appealed from. Even creditors coming in before the master under a decree have been held entitled to an appeal, although not parties to the bill, because the decree affected their interests." * * * "And it has been held that if the right of a remainderman, or of any person entitled to the estate in any way, is bound

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by the decree, he must have a right to appeal from it, as well as the person against whom it was made. Upon this ground it has been held, that a tenant in tail in remainder expectant, after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate against the prior tenant in tail,) has a right to appeal against the decree in that suit; and that he may file a supplemental bill for the purpose of making himself a party to the suit, in order to appeal from it."

From what has been said, I conclude that upon the face of the record, the order of the 22d June, 1872, was the only one from which the appeal could have been taken, and that it was erroneous, and should be reversed.

That there was no consolidation between the Florida Central and Jacksonville, Pensacola & Mobile Railroads.

That whether there was or not, no rights or equities grew out of it in favor of either the Trustees or the State of Florida.

The the Trustees have no rights and no claim as against the road from Lake City to Jacksonville, in any view that may be taken of the subject.

That the allegations in the original and amended complaints, and the prayers for relief, afford no ground of equity in favor of the State against the Florida Central Railroad Company or their road.

That nothing therein made it either necessary or proper that a Receiver should be appointed.

That if there had even been a *prima facie* case for a Receiver, there was wanting the necessary facts and arguments to authorize such appointment without notice.

That except in special cases, to be disclosed in the bill, a Receiver is not to be appointed without notice and an opportunity given to the defendant to be heard on the motion.

The the order of 22d June ought to be reversed for want of capacity in the Judge to grant it, his functions having been suspended by the assignment of another Judge to hold

and who was actually holding the term at the time the order was granted.

That the order assigning the Judge of the Second Circuit to hold the term in Duval county was within the official power of the Chief Justice to grant it, and was, therefore, legal and valid.

That the Florida Central Railroad Company having been made a party to the suit, had the right, and was, and is entitled to all the benefits of an appeal.

George P. Raney for Florida Central Railroad Company and others.

Order of June 22, 1872.

The reversal of this order is asked by the appellant, E. M. L'Engle, in so far as the same vacates the order made in L'Engle's case vs. the Jacksonville, Pensacola and Mobile Railroad Company, *et als.*, in Duval Circuit Court, appointing James M. Baker, Esq., Receiver of the Florida Central Road.

Even admitting, for purposes of argument, that the allegations in the original complaint, and the amended complaint of June 22, 1872, justify the court in assuming consolidation, there is nothing in them sufficient to sustain the vacation of the order in L'Engle's case.

The record shows that an order appointing Baker Receiver had been made in L'Engle's case, although the order does not appear *totidem verbis*, and it further shows that this order was made subsequent to the order of Judge Gillis of March 20, 1872, in this cause, appointing Greeley Receiver of the whole road from Jacksonville westward, and prior to the above order of June 22. The amended bill states that Receiver Greeley had, on the application of L'Engle in his case, been displaced as to the Florida Central Road, and another Receiver appointed. In the prayer of the same bill Baker is spoken of as the Receiver appointed in L'Engle's suit, and the order appointing him is prayed to be

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vacated. The record contains a petition of Receiver Greeley, complaining that Baker, the Receiver then in possession of the Florida Central, was collecting part of the freight and passage money of the Jacksonville, Pensacola and Mobile Road then in his (Greeley's) possession, and praying that Baker be ordered to pay the petitioner all moneys received by him arising from freight or passengers carried over the road of the Jacksonville, Pensacola and Mobile Railroad Company, from Lake City to the Apalachicola river. The record gives the order made by Judge Wheaton June 6, A. D. 1872, on this petition, and this order recognizes and deals with Baker as Receiver of the Florida Central and with Greeley as Receiver of the Jacksonville, Pensacola and Mobile, and grants the prayer.

In view of these facts it is useless for the respondents to contend that no order vacating Judge Gillis' order of March 20, 1872, had been made. The record plainly shows that such order, so far as it affected the Florida Central, had been vacated, and that Baker had been in possession of the Florida Central as Receiver, appointed in L'Engle's case, and his possession recognized by the court and admitted by respondents. Not only is the fact of the order appointing Baker Receiver having been made apparent, but there is nothing in the record to show that it was made without notice, or is in anywise void. The court below being a court of general jurisdiction, this court will assume that the order was valid, unless the contrary appears from the record. An appellate court never assumes error in a lower court of general jurisdiction, but always the contrary until the error is made to appear. For this court to hold that no effect shall be given to the order appointing Baker Receiver, it must assume it to be void. In *Ponder vs. Mosely*, 2 Fla., 207, 267-8, it is said that "judgments of courts of general jurisdiction are not considered under any circumstances as mere nullities, but as records importing verity and of binding efficacy, until reversed by a competent appellate tribunal."

This court must hold, we believe, that there was a legal order appointing Baker Receiver made in L'Engle's case, and that the same was in full force when the order of June 22d was made.

Again: The order of June 22, so far as excepted to above, is erroneous, and should be reversed, because the record shows that it was made without notice.

The argument of Mr. Papy shows the error of the order, so far as it appoints Receiver without notice, and it would be uncharitable to impose upon the court further discussion of the case on this point. The principle laid down by this court in the case of Swepson *et al.* vs. Call and Baker, 13 Fla., 337, *et seq.*, and Swepson vs. Commissioners Columbia county, 15 Fla., is, we think, decisive of the case on this point. There is nothing in the code changing the ordinary rules as to the necessity of notice in appointing Receivers.

2. Order of June 24, 1872.

The appellant L'Engle excepts to this order in so far as the same pretends to consolidate his suit in Duval Circuit Court with this case, or orders him to come in as a defendant herein.

First. It is erroneous, and should be reversed, because made without notice to L'Engle.

The code, by the provisions of which the proceedings in this cause are governed, does not expressly provide in what cases or under what circumstances notice of an application for an order shall be given to the adverse party. Section 335 provides that when notice of a motion is necessary, it must be served eight days before the time of hearing, and that the court or judge may, by an order to show cause, prescribe a shorter time. It being a general principle of law as well as abstract right and the good morals of justice that no man should be adjudged without a hearing, we may reasonably assume that there being no specific provision in the code doing away with notice, but it expressly providing what the usual notice shall be, and the practice to be fol-

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lowed when shorter notice is proper, that notice should always be given in one of the ways provided by Section 335, unless there are particular circumstances made clearly to appear to the court showing that notice will defeat the purpose and effect of the relief sought, and to which the party seeking is showed to be entitled.

In *Androville vs. Brown*, 15 Howard, 75, and 4 Abbott, 440, cited in Wait's Code, page 845, it is said: "The code, as a general rule, requires that motions shall not be made without notice of eight days, and although the court or judge may prescribe a shorter time or even dispense with notice altogether, the power was intended to be confined to exceptional cases, and not to be exercised indiscriminately on all occasions."

Again: In *Springstein vs. Powers*, 4 Rob. 624, cited on the same page of Wait's Code, it is said, "an order to show cause cannot properly be made unless the papers upon which the same is founded show a reason for shortening the regular and usual time for notices." And in 1 Tiff. and Smith, pages 432, 33, the same view is advanced.

We cannot see that there is in this case anything "exceptional," nor do the papers in the cause show any reason for even "shortening" the regular and usual time for notice, and certainly none for doing away with notice altogether.

3. *Order of March 25, 1874.*

The Florida Central Railroad Company and Edward M. L'Engle as appellants in the second appeal, and Edward M. L'Engle, George R. Foster and Francis B. Papy as appellants in this appeal, except to this order and ask a reversal of the same.

This order pretends both to continue and constitute J. C. Greeley as Receiver of the Florida Central Road, and directs him to take possession of the same, &c., it recognizing the fact that it was in the possession of said Papy, L'Engle and Foster.

The supplemental complaint, which is one of the papers upon which this order is made, is not sworn to, nor is there any affidavit supporting it, and consequently nothing which will be found in it was entitled to any consideration from the court below, as the basis for the order. There is further nothing in the amended complaint, nor in the affidavits of Littlefield or Bisbee in any manner justifying the order, nor is there anything in the complaint justifying it. This original complaint is, we contend, supplemented and superseded by the amended complaint of June 22, and is not to be considered at all in any proceedings in this cause subsequent to the filing of the amended complaint. This order was made without notice, and should on this account be reversed on the principle announced in the case of Swepson vs. Call and Baker in 13 Fla., and Swepson vs. Commissioners Columbia county, 15 Fla. This order, we claim, must be considered as an original order appointing a Receiver, as it has been made to appear that the order of March 20, 1872, was revoked by the order in L'Engle's case, for as it affected the Florida Central Railroad and the order of June 22, 1872, was improper for reasons assigned in the first part of this argument.

4. Judgment of April 2, 1874.

The Florida Central Railroad Company and Edward M. L'Engle, appellants in the second appeal, and all and singular the appellants in this appeal, except to this order of judgment on the following points, and ask that the same be reversed:

First. It adjudges that the Jacksonville, Pensacola and Mobile Railroad Company is now and was the owner of the railroad from Jacksonville to Lake City at the institution of this suit, and of the corporate franchise to own and operate said road, the road of the Florida Central Company.

Second. It adjudges the Florida Central Railroad Company to be consolidated with the Jacksonville, Pensacola and Mobile Railroad Company.

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Third. It "continues" J. C. Greeley as Receiver of the railroad from Jacksonville to Lake City.

Fourth. It provides and decrees that execution, (*elegit* or *feri facias*,) shall issue against the property of said Florida Central Railroad Company. This is the effect of the decree, as it adjudges the road of the Florida Central to be the property of the Jacksonville, Pensacola and Mobile Railroad Company, and also adjudges consolidation of the two companies.

This is in fact a final judgment made after the Florida Central Company had been made a party, as the amended complaint had prayed and had answered the amended complaint of June 22, 1872, and put in issue the allegations of the same as to consolidation. The record shows that after being made a party, the Florida Central Company demanded and received a copy of the amended complaint, and was recognized as a defendant by the complainants.

The issue of consolidation being thus raised by the pleadings, the trial should have been upon regular notice to the Florida Central Company, made in writing and served at least eight days before the trial, as provided by Section 20 of the code. Instead of this no notice of trial is given, but the Florida Central Railroad Company is adjudged out of existence, not on trial of the issues it has raised nor upon notice, but by ignoring its pleadings and adjudging the answer of another defendant frivolous. If under any conception of the law, an adjudication of the answer of one defendant as frivolous could be held as effectual against another defendant who has answered, certainly the five days' notice required by Section 195 of the code should have been given to the Florida Central Company. It was not given. Besides the absence of notice, there was no testimony in the case proving consolidation. If any was sought to be introduced to overthrow the Florida Central Company's denial of consolidation, it should have been at a trial regularly noticed.

as above stated, or before a referee duly appointed for that purpose.

Again: The court will find from a careful scrutiny of the complaint, filed March 24, 1874, had ever been served on the Florida Central Railroad Company, nor had any notice of the filing been given to this defendant, nor had it had an opportunity to answer the same. The same was filed without the permission of the court being first had and obtained. Section 127 of the code provides that it shall be done on motion, and from page 335, par. 1, (g,) of Wait's N. Y. Code and the authorities there cited, it is shown that the "one uniform mode of applying to the court for leave to file a supplemental proceeding established, is by motion on proper notice or order to show cause." No notice was given to the Florida Central Company, nor to any of these appellants, nor order to show cause obtained or served.

Again: the court will find from a careful scrutiny of the amended complaint, and the unverified supplemental complaint, the affidavit of M. S. Littlefield and the other papers, which it is presumed the Circuit Judge of Duval county considered as evidence of consolidation, that the facts stated in them show that Littlefield never was the owner of all the stock of the Florida Central Company, and that there was no consolidation. There is nothing in the record that shows that the companies ever, "by a vote of a majority of the stock in interest," as the statute requires, consolidated, or that either company ever took such a vote. Mr. Papy's argument and authorities show that no such vote would have been effectual, if taken, had the minority dissented.

The judge had no right to consider any of these papers or pleadings as evidence for the purpose of making such a decree.

Second. The reasons above given apply equally to the fourth exception as well as the first and second exceptions to this judgment.

Third. A reversal of the judgment as to the above stated

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features, involves a reversal of it as to the fourth exception.

Fourth. The argument and authorities of Mr. Papy sustain the third exception to this judgment, and the reasons above given are sufficient to justify this court in reversing the judgment, if it is to be considered as a final decree continuing Greeley as Receiver to operate the road for the purpose of applying the net proceeds of the operations to the satisfaction of the decree, which it plainly is.

The decree presents the unique judicial spectacle of the obliteration of a corporation which came into court at the call of the plaintiffs, summarily adjudged out of existence without notice or proof and without a hearing, and its property declared to be and appropriated as the property of another.

5. *Order of April 12, A. D. 1874.*

The appellants in this cause except to the order of April 12, 1874, and ask its reversal.

First. In so far as it enjoins the appellants from interfering with the railroad between Jacksonville and Lake City, rolling stock, &c., either as president, treasurer, superintendent, directors, or in any capacity whatever.

Second. In so far as it enjoins the appellants and each of them from bringing any suits for the purpose of asserting any right, title or interest, either as stockholders or otherwise, into or of any part of said road or the appurtenances, &c., thereof.

Third. In so far as the same enjoins the appellants from using the name or corporate seal of the Florida Central Railroad Company in any manner, or from in any manner appearing in, pleading or defending this action, or from appealing from any order made in this cause, or any order that may be made hereafter in the name of the Florida Central Railroad Company.

Fourth. In so far as the same in any manner affects by its terms applies to appellants.

Fifth. In so far as the same affects others named therein

similarly to the effect specified in the first, second and third exceptions, as being had by said order to these appellants or either of them.

Were the judgment of April 2d a valid, regular judgment, rendered upon legal testimony and due notice, instead of being of the character heretofore set forth, then *this* order might have been proper as a means of enforcing such judgment, for had it been adjudged upon a regular hearing that the Florida Central Railroad Company was defunct, then so long as the judgment stood unreversed, or without being superceded by an appeal and supersedeas bond, or whatever was necessary to operate as a supersedeas being done, no former officer or party to the suit should be allowed to act upon the presumption of the existence of the company, otherwise the judgment would have been fruitless. The judgment of April 2d being of the character heretofore shown, it is not a basis for any such order. This order finds a fatal objection in respect to each point as to which, it is excepted to, and asked to be reversed on the ground of being made without notice. If such an order could be made without notice, then courts of justice would be not the forums in which defendants could litigate their rights, but the resort of arbitrary power where they are deprived of appealing to the law of the land, which presumes to say they shall not be deprived of their property without a hearing.

The principles heretofore laid down as to making orders and injunctions without notice, and the authorities cited, are referred to as necessitating the reversal of this order as to the appellants in this appeal; and the court is asked to reverse the orders and judgments in each and every respect, in so far as they affect the appellants in these two causes.

D. P. Holland for himself.

We hold that the Duval Circuit Court did not have jurisdiction in this action to appoint a Receiver of said railroad, which was beyond its territorial jurisdiction.

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First. Because the property was realty, and no part was within the territorial jurisdiction of the Duval Circuit Court or the Judge thereof.

The jurisdiction of the Circuit Courts as to their territorial extent, is limited to the subdivisions of each circuit whereof it is composed, as prescribed in the 6th Article and 7th Section, and in the 16th Article and 3d Section of the Constitution; and that the equity jurisdiction of the Circuit Courts as to their territorial extent is limited to the circuit of each Circuit Court by the 8th Section of Article 6, where it says "the Circuit Courts in the several Judicial Circuits shall have original jurisdiction in all cases of equity."

At pages 321-2, 14 Florida Reports, Mr. Justice Westcott, for the court, says: "The Constitution restricts the jurisdiction of the several Circuit Courts to the counties named. The territorial subdivision of a Judicial Circuit are described as counties in the Constitution; a name is given to each subdivision, and the jurisdiction is necessarily limited to such named subdivision."

It was not intended by the Constitution to vest a judge with the power to act on property outside his circuit by appointing a Receiver thereon; and thus, as by the record before this court, produce mischievous litigation, and unseemingly conflict between courts.

"Where a decree is sought, which is to act on the property itself, the suit must be brought in the district in which it is located." 13 Fla. Rep., 203; 1 Black. C. C., 537.

"The jurisdiction of a court of equity to decree a sale mortgaged premises depends on the locality of the land and not on the domicile of the owner of the equity of redemption." 3 Wall., Jr., C. C.

"Equity cannot act directly on land not within its jurisdiction; it may compel the holder of the title, who is a party before the court, to give effect to a lien." 16 Howard, 1; 1 Black. C. C., 537; 3 McLean, 358.

The acts creating the Jacksonville, Pensacola and Mobile Railroad Company, and from which all its powers, and privileges, and rights of property existed, were public acts of the State of Florida; (see Sec. 24, page 35, act to perfect the public works of the State, 1869, and the amendatory statute of 1870, Sec. 9 page 14.)

The said acts being public acts, the Judge of Duval Circuit Court was bound to take judicial cognizance of the existence, rights, privileges, locality and disabilities of the Jacksonville, Pensacola and Mobile Railroad Company, and that the railroad thereof was, by the public statutes, authorized to commence at Quincy and terminate at Mobile. And that the same was not within his territorial jurisdiction.

By the statutes of Florida the Judge of the Fourth Circuit had judicial cognizance that the Jacksonville, Pensacola and Mobile Railroad Company's Railway was not within his territorial jurisdiction.

The facts alleged in the plaintiffs' complaint showed the court that the Florida Central Railroad Company had not been consolidated with the Jacksonville, Pensacola and Mobile Railroad Company.

At the time the Receiver was appointed by Judge Gillis, an action was not commenced against the Jacksonville, Pensacola and Mobile Railroad Company; and if this is true, it follows a Receiver could not be appointed. 2 Daniels C. P. and P., pages 1422, 1426.

Section 78 of the Code says: "Civil actions in the courts of record of this State shall commence by service of the summons." Bush's Dig., 479. We have seen that the corporation had not been served with summons, but that some of the individual defendants had been served.

Section 53 of the Code, (Bush's Dig., 472,) which prescribes "where action deemed to have been commenced," only applies to the statute of limitations, &c.

In Voorhees' Code, p. 83, note b, commencement of action, he says: "The delivery of a summons to the sheriff to

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be served, with an intent to have it served, is the commencement of an action. But only for the purpose of defeating the statute of limitations, the mere issuing of a summons is not the commencement of an action for general purposes," citing 18 Abb., 360; 7 ib., 241; 28 N. Y., 659.

Voorhees, on the Code, p. 348, note a, on appointment, says: "A receiver cannot be appointed until a suit is commenced, except in cases of lunatics, or where the defendant designedly keeps out of the way," and cites authorities.

So that we have shown—

1. That Judge Gillis appointed a Receiver on all the property of the Jacksonville, Pensacola & Mobile Railroad Company, when an action had not even commenced against the corporation.

2. Because the property was beyond the territorial jurisdiction of the Judge of the Fourth Circuit.

3. Because there was no notice given to the defendant corporation.

The rule laid down by this court, *Swepson et al. vs. Call* and *Baker*, 13 Fla., p. 359, as to the appointment of a Receiver without notice, is: "It is insisted by the appellants that notice of the application and the appointment of a Receiver should have been given, and that it is required by the rules of chancery. This is undoubtedly the general rule, but we cannot say that emergencies may not exist which will warrant the exercise of the power without notice."

Voorhees at page 348, note a, as to the appointment of a Receiver under the code, says: "He cannot be appointed without notice to the party interested, except under peculiar circumstances," and cites *People vs. Norton*, 1 Paige, 17, and several authorities.

We hold that "the peculiar circumstances" nor "the emergencies" which would authorize the appointment of a Receiver without notice, did not exist in this case.

1. The property is a railroad. By the complaint it is shown to be in operation from Jacksonville to Chattahoochee.

chee, Tallahassee to St. Marks, and the Monticello branch. A part of this vast property, to wit: from Lake City to Quincy, and from Tallahassee to St. Marks, and the Monticello branch, is shown to have been sold by the plaintiffs for \$1,415,000, and that of this purchase bid \$966,000 was paid, leaving as unpaid \$449,000. See clause 4, 5 and 6 of the complaint. And for this balance the plaintiffs prayed judgment for the sum of \$572,000. Grant that this amount was due. The same property was sold by these plaintiffs for one million four hundred and fifteen thousand dollars, and the plaintiffs alleged that the Jacksonville, Pensacola and Mobile Railroad Company not only owned this property, but that it had acquired by consolidation sixty more miles of another railroad, to wit: the Florida Central, and had constructed twenty-two miles additional from Quincy to Chattahoochee. So that if, as plaintiffs alleged, they had a lien on all this railroad property, it was on property worth five times as much as what they said was due them. And on realty, to wit: a railroad that in its very character was permanent and capable of responding to the decree or judgment prayed for if rendered. All the trusts alleged in others which they said had no priority over them, the complaint alleges were to extend this property, and that thousands of dollars had been expended in improving the property and paying debts and extending the road.

2. They show they accepted a check for the balance of the purchase money, which check was received as cash by their agent, Swepson, and that they gave possession and delivered titles to the purchasers, who were afterwards incorporated as the Tallahassee Railroad Company, which company afterwards conveyed the railroads so sold to the Jacksonville, Pensacola and Mobile Railroad Company. They show these corporations, each and both, were not in existence when this payment and delivery of titles took place. That the corporations were created afterwards.

The plaintiffs state the agent, Swepson, who received this

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check, was worth a vast property in Florida, besides the \$960,000 of bonds they had received from him, to wit: the Florida Central Railroad. They do not state that it was given or drawn by insolvent parties or was worthless.

They allow corporations to be created and this property to pass from the hands of individuals to a corporation, and from that corporation to another corporation, without dissent or hindrance, or attempt to do so for three years, and then, without notice—without a summons being even served on the corporation—they obtain a Receiver on, not only this property sold, and which lay in the Second and Third Circuits, but upon all the property, real and personal, of the corporation, and not only on that which it owns, but on all that it has in possession belonging to others. (See the order appointing a Receiver.)

Is this such an "emergency," or special or "peculiar circumstances," as would authorize the appointment of a Receiver without notice?

Does it not appear that instead of being the object of the plaintiffs to proceed, according to the rules of equity practice and jurisprudence, it was a device to obtain the control and possession of this vast property, by taking it from the corporation and its officers?

This demurrer, by the code, does not waive the question of jurisdiction. Sec. 94, Code, Bush Digest, 485. "The only pleading on the part of the defendant is either a demurrer or an answer."

Section 95 declares when the defendant may demur.

Next. We hold that Judge Archibald was disqualified from granting, or giving any order whatever in this case, saving an order to have the same heard by some other Circuit Judge, and to transfer the cause, because he had been while an attorney consulted by the Receiver, J. C. Greeley, in this case. See the record, page 441, where the Judge refused to hear the petition of the Atlantic and Gulf Railroad Company, and transferring the cause. Hence, we hold

by the statutes of Florida, all his orders and decrees, except the order of transfer as above, are void. Act 1862; page 392, Bush Digest, § 54, § 55; p. 390 ib. § 48; p. 391 ib. § 49.

This was a petition of the Atlantic and Gulf Railroad Company to recover monies collected by said J. C. Greeley as Receiver, belonging to this corporation. See page 191. This petition was set for hearing in the referees' report by consent, (see page 199,) and was refused to be heard by Judge Archibald, and ordered to be transferred. See page 441. Yet Judge Archibald made various orders in this action, and gave a final judgment in April, A. D. 1874. By filing this bill in the Supreme Court of the United States, the plaintiffs had dismissed their action in Duval Circuit Court. The plaintiffs filed an original bill in the Supreme Court of the United States in December, 1873, against Holland, alleging the same matters as in the Duval Circuit Court action, and filing the record of that State court and this action as an exhibit.

They alleged, among other things, that Holland had at a judicial sale purchased this property, and that his purchase was void by reason of the property being, at the time of the sale at which Holland bought, in the hands of a Receiver of Duval Circuit Court, and these same plaintiffs prayed that Holland should be dispossessed of this property and perpetually enjoined from asserting any title by reason of his purchase at said sale, and that the Supreme Court of the United States should order the property to be returned to J. C. Greeley, or appoint a Receiver of that court. And the plaintiffs moved that court for a preliminary injunction and for a Receiver against Holland. Both these motions were heard by that court and refused, and the court ordered Holland in December, 1873, to report the receipts to that court, &c.

And while thus obeying the Supreme Court of the United States in a cause in that court pending on bill brought by these plaintiffs, they, dissatisfied with the decision of the

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Supreme Court in their own cause, proceed to the Duval Circuit Court, and without notice to Holland, and while he is obeying the Supreme Court of the United States; and has been for four months, the plaintiffs, on this supplemental proceeding, obtain an order dispossessing Holland, perpetually enjoin him and take the property out of his possession by force, and summon him to answer for contempt of Duval Circuit Court in this action.

Holland was a purchaser at a judicial sale of all the real and personal property of the Jacksonville, Pensacola and Mobile Railroad Company, made by the United States Marshal by virtue of an execution issued from the United States Circuit Court on the 14th December, A. D. 1872; the sale being made on the 5th of May, A. D. 1873, while the Jacksonville, Pensacola and Mobile Railroad Company had pending a motion to the jurisdiction of Duval Circuit Court, and a demurrer to the plaintiffs' complaint, which in short, was that the action then brought was for a debt that this company was not responsible for, and could not pay if it would, by the 15th Section of the Act of 1869. Neither motion to the jurisdiction nor demurrer was decided while Holland sold. There was no Receiver in possession, nor had there been for months prior to Holland's seizure, let alone sale.

The Judge of the Second Circuit had decided that the Judge of the Fourth Circuit did not have jurisdiction to appoint a Receiver.

"If an execution defendant is in possession of lands at the time of the levy, this is *prima facie* evidence of title authorize a sale on execution." 19 Wis. 253.

Second. Holland's rights are not liable to be taken from him by any waiver by pleading or otherwise of the Jacksonville, Pensacola and Mobile Railroad Company after the levy and sale by Holland.

The record will show that there was no waiver of jurisdiction or other matter prior to Holland's purchase in Ma

1873, and even if there was by this corporation afterwards, which we deny, it could affect Holland's title or rights to the property.

The Jacksonville, Pensacola and Mobile Railroad Company could make no consent to affect that sale by pleading or otherwise.

But if the Duval Circuit Court had jurisdiction in April, 1874, they had jurisdiction in May, 1873. But the plaintiffs saw fit, instead of summoning Holland before the Duval Circuit Court, to summon him to answer and abide by the decrees of the United States Supreme Court.

And by so doing, I hold they dismissed their action in Duval Circuit Court.

Equity abhors a multiplicity of suits. "It is against the whole policy of courts of equity to encourage multiplicity of suits." Story's Eq. pleadings, § 746, 735; 2 Foster, 23, (N. H. ;) 1 Daniels C. P. and P., 657-9.

Plaintiffs sue Holland in the Supreme Court of the United States, pray to have him dispossessed and enjoined, and are refused by the court who orders Holland to report to that court.

Plaintiffs then dissatisfied, seek Judge Archibald, and without giving Holland any notice or serving any papers on him dispossess him of property purchased at a judicial sale lying in the Second and Third Circuits, and perpetually restrain him from even setting up any right in any court, or claiming so to do.

Therefore we hold—

1. The Duval Circuit Court did not have jurisdiction.
2. The appointment of a Receiver was illegal and without lawful authority,
3. That there was no action commenced against the Jacksonville, Pensacola and Mobile Railroad Company when the Receiver was appointed.
4. That the complaint did not state facts sufficient to

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constitute a cause of action against the Jacksonville, Pensacola and Mobile Railroad Company.

5. That by reason of plaintiffs having brought suit against Holland in the Supreme Court of the United States, they had dismissed the suit in Duval Circuit Court as to him.

8. That the judgment given on account of a frivolous answer was error.

9. That there is no equity in plaintiffs' case to warrant a decree as rendered.

10. That for these reasons the action should be dismissed.

11. That the orders and decrees rendered ought to be reversed.

Mr. Attorney-General W. A. Cocke for the State.

The State has no interest in this suit, and should not have been made a party. The interest of the State does not require its further prosecution. The actuating cause in this suit was the desire to establish a statutory consolidation of the Florida Central and the Jacksonville, Pensacola & Mobile Railroad Companies.

The act of consolidation was unconstitutional. The railroads could not be consolidated under the acts of the Legislature. The companies must act in relation thereto, which they never did.

This suit was conceived in a fraudulent effort to obtain a decree of the court sustaining consolidation with a view of covering the fraud connected with the issuing of the four million dollars worth of bonds of the State, which had been delivered to certain agents of what was illegally styled the Jacksonville, Pensacola & Mobile Railroad in lieu of its bonds, evidently considered worthless by the State, or else it would not have attempted to give them a fictitious value by exchanging them for State bonds—bonds no one pretends to consider legal or binding, and in reality being nothing more nor less than an effort at a swindle.

This suit was brought during the few weeks Lieut.-Gov-

ernor Day acted as Governor, by parties evidently coinciding with him, and in his interest, to sustain which they voluntarily placed themselves in the strange position of filing a bill and attempting to set forth equities therein based upon the grounds on which the same parties had successfully carried through the Assembly of the State of Florida, by a unanimous vote, articles of impeachment against Governor Harrison Reed. *Vide* Articles of Impeachment against Harrison Reed, Assembly Journal, 1872, Art. IV., p. 259.

H. Bisbee, Jr., for Trustees of the Internal Improvement Fund, Appellees.

There are three appeals and three records in the case entitled as above, which, by consent of the court and counsel, are argued together.

The first appeal is by the Florida Central Railroad Company from the order dated June 22, 1872, made by Judge Wheaton upon the filing of the amended complaint.

The first error assigned is that at the time the order appealed from was made, Judge White was the only judge who could make any order in the case.

If this assignment of error is sustained, then the order appealed from is a nullity. The appellee contends that the Chief Justice could not send Judge White into Duval county to hold a part of the term. But if such power exists, under the order of the Chief Justice Judge White's power continued only during Judge Wheaton's temporary absence. The fact that he made the order is the highest evidence that he was present.

The second error assigned is that the Florida Central Railroad Company was not a party to the case when the order was made. Surely then this company could not appeal. It is only a party in its technical sense who can appeal. Code of Procedure, Sec. 269; 2 Abbott's R., 390; 2 Cal., 57; 3 Md. Ch. Decisions, 186.

In appealing from this order the appellant assumes that it

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conferred new authority upon the Receiver, J. C. Greeley, over the road east of Lake City, and that the appellant was entitled to notice. On the other hand, the appellee contends that the order appealed from conferred no authority whatever upon the Receiver.

The record discloses that Greeley was appointed Receiver March 20, 1872, over the entire road west of Jacksonville; and the court is specially urged to bear in mind that the original complaint alleges that Chase and others were in possession of the road under a deed of trust made by the Jacksonville, Pensacola & Mobile Company October 2, 1871, and that the Florida Central Company was consolidated with the Jacksonville, Pensacola & Mobile Company. *Vide* original complaint, subdivisions 12, 13, 14, 16, also 17 and 18. The amended complaint also alleges the same facts more in detail.

This court must assume as true every fact which the court below had a right to assume as true, and the appellant cannot for the first time on appeal question the truth of a statement of fact. An appeal lies only to correct errors of law. Abbott's N. Y. Digest, vol. 6, p. 22; 8 Wend., 219; 10 Barb., 112.

This court then, for all purposes of this appeal, must take it for granted that consolidation had taken place, and that Chase *et al.*, Trustees, were in possession of the property under a deed of trust, which did not expire until October 2, 1873, and which deed treated the entire road as the property of the Jacksonville, Pensacola & Mobile Railroad Company.

As Chase *et al.* have not appealed, the question as to whether or not the Receiver was properly appointed, as between them and the plaintiffs, is not before this court. The main question raised is what were and are the rights of the Florida Central, assuming, for sake of argument, that there was such a company, and what were the proper judicial steps for such company to recover possession of its property, if it had any, in the possession of the Receiver?

The appellee submits that there was but one mode of proceeding known to judicial proceeding for the appellant to pursue to recover possession of its alleged property, and that was to apply to the court below by petition setting up its title to the property claimed, and praying for an order upon the Receiver to deliver up the property to it.

When a party is out of the possession of property to which he claims the legal title, and he finds a receiver in possession of it, in a suit against the parties in possession he must intervene, allege, and prove his title to be superior to the title of the party found in possession, and ask to have it delivered up to him.

If the court below denies his application, he can then appeal from the order denying it, but not before. Upon this point we cite the following authorities, and challenge judicial authority to the contrary: 14 How., 52, 60, 61, and opinions of the court and cases cited therein; 7 Paige, 513; 9 ib., 373; 3 Gordon & MacNaghton R., 104; Lord Truro's opinion cited in 14 How., 60-1; 9 Ves., 335; 6 ib., 287.

The party out of possession must pursue the above course, "although his right to possession is clear." 2 Dan. Ch. Pr., 1433; 6 Ves., 287.

A court of equity will not on such application aid a party unless he shows a right free from apparent doubt, and that he has been guilty of no negligence, but been active and vigilant in the assertion of his rights, and that he is acting in good faith. 1 How., 161, 191; 8 ib., 210; 9 Peters, 416.

Had the appellant taken this course, and intervened as it ought to have done, all the confusion, irregularity, and disorder which are disclosed by the record would have been avoided.

Now examine the course taken by the Florida Central Railroad Company, the appellant. The appellant was silent and took no steps at all to recover possession until March, 1873, when it appealed from the order of June 22, 1872. The property was out of its possession, as appears from the

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record from June, A. D. 1870, to March, 1873, nearly three years. From June, 1870, to October 2, 1871, it was in the possession of the Jacksonville, Pensacola & Mobile Company. From October 2, 1871, to 20th March, A. D. 1872, it was in the possession of Chase, Gordon and Ambler, under deed of trust. From March 20, 1872, to the last of May, 1872, it was in the actual possession of J. C. Greeley, Receiver, appointed in this cause. From the last of May, 1872, to March 20, 1873, it was in the actual though irregular and wrongful possession of Receiver James M. Baker, appointed at the suit of E. M. L'Engle.

It is submitted that the silence and acquiescence of the appellant all this time is remarkable and inexplicable. Is it possible that a party with any just claim to property would suffer it to remain in the hands of other parties for three years—especially a valuable railroad property? Surely under such a state of facts a court of equity would not order the property delivered up to them without the proof of legal title beyond all doubt.

Has Receiver Greeley ever been discharged? Clearly he has not.

I need not cite authority to show that when a Receiver has been put in possession of property, he must hold the property until he is ordered to deliver it up by the court appointing him. He must obey the order appointing him until he gets another order directing him to deliver it up. No such order has ever been given.

Even an order vacating the order appointing him does not relieve him unless he is directed to deliver up the property.

There is not a word in the record to show that the order of March 20, 1872, appointing Greeley Receiver, has been revoked or vacated.

Appellant contends that the appellee has admitted by the language of the amended complaint, filed June 22, 1873, that Greeley was displaced from the possession of the road east of Lake City.

In the amended complaint it will be seen that plaintiffs alleged that Baker had been appointed Receiver at the suit of L'Engle over the road east of Lake City, and Greeley displaced therefrom.

But the very object of alleging this was to complain of it, as we do complain of it in such amended bill, and ask that Greeley may be restored to possession. Certainly a party may allege an act done without alleging that it was right-fully or legally done. Complaint alleges Baker's appointment, and that Greeley was displaced from possession, but not that it was duly or legally done. We contend that Greeley could not be regularly and legally displaced in any way other than by an order entered in this case, whereas he was actually displaced by an order entered in L'Engle's suit.

The amended complaint set forth the proceedings in L'Engle's suit, and asked that Greeley might be restored, when the court entered the order of 22d of June, 1872. This order itself states that Greeley had been previously appointed, and purports to vacate the order appointing Baker, and then proceeds to declare that Greeley shall "be held and regarded as such Receiver over the whole line of railroad," &c. Thus it plainly appears—

1. That the order of June 22d, 1872, did not appoint Greeley Receiver.

2. That it assumed the validity of the order of March 20, 1872, and that the same was still in force.

3. The order of June 22d assumed that Greeley was already the legally appointed Receiver, and that Baker was improperly put in possession, and proceeded to vacate the order appointing Baker.

4. The order of June 22d does not confer any new authority upon Greeley. It removes Baker, but does not order him to deliver up the property to Greeley even.

It vacates Baker's appointment and thus leaves Greeley free to exercise his powers under the order of March 20, 1872.

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The language of the order, "shall be held and regarded as such Receiver," &c., is without legal effect. It is simply a declaration that Greeley had been previously appointed, and that all his powers as such should be respected, but did not confer any new power upon him.

5. The appellee therefore contends on this point that whether this order of June 22, 1872, is confirmed, or reversed, or declared void, as it should be, Greeley's authority still continues under the order of March 20, appointing him.

The possession of a Receiver cannot be disturbed by an order entered in another case. 14 How., 65, *et seq.*; 2 Paige's Ch., 342; 10 ib., 43; 2 Vol. Redfield on Railways 363; Edward's on Receivers, p. 12.

The commencement of another suit by L'Engle to recover possession of property in possession of Receiver Greeley was a contempt of court. 14 How., 65-6-7.

The following applies to all three of the appeals, and discusses in the main the following three propositions:

First. That all orders made in the case subsequent June 22, were properly made and should not be reversed.

Second. That the complaint and amended complaint make a proper case for the appointment of a Receiver.

Third. That the court below had jurisdiction whether or not the Florida Central Company was consolidated with Jacksonville, Pensacola and Mobile Company, and that consolidation is well made out upon the allegations in the complaints.

The appellee has already shown that the Florida Central Railroad Company was not in possession of any part of the railroad when Greeley was appointed, nor when the order of June 22, 1872, was made, and now calls the attention of the court to the fact that not one of the parties who has appealed was in possession of or exercising any control over any part of the road when the Receiver, Greeley, was appointed, nor were any of them parties to the case.

It is a remarkable feature of this case, or of these cases,

that every one of the appellants got into the possession of the property without applying to the court below to deliver it up, and therefore in contempt of its authority. We have already shown by authority that a party out of possession, when a Receiver is appointed and not made a party to the case, must apply to the court, set up its title and pray for possession.

A party cannot have the sufficiency of his title passed upon for the first time in the appellate court. The latter can only correct errors of law committed by the court below.

Now the Circuit Court of Duval county has never passed upon the title of the Florida Central nor of Holland. They have never come into that court and set up their title, and it is, therefore, plain that this appellate court cannot now decide whether or not the appellants have any title worthy of protection. In other words, the whole theory of the appellees is that as between the parties, plaintiffs and defendants in possession, Greeley was properly and rightfully appointed Receiver, and all subsequent proceedings of the appellants to get possession of the road have been irregular or void, and in contempt of the order of the court below. That the orders upon Holland and L'Engle *et al.*, to deliver up possession and restraining them from interfering, were necessary to protect the Receiver in his possession.

These appellants are all trespassers and interfering claimants, and cannot question the validity of the order of March 28, 1872, appointing Greeley Receiver. 14 How., 65; 20 ib., 594, and cases cited.

Holland acquired what interest he has after Greeley was appointed Receiver. The sale by United States Marshal, when the property had been taken possession of by the State court, was a nullity, whether the Receiver was in actual possession or not. 14 How., 52.

It is submitted that so far as these appellants' actions are concerned, and the actions of other parties in a suit before

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Judge White, these are all efforts, and should be regarded as efforts to impede and obstruct the Circuit Court of Duval county in the administration of justice and to acquire the possession of the railroad property, without applying to the court.

Cause of Action—The cause of action by the Trustees of Internal Improvement Fund was \$472,000, the balance of purchase money due and arising from the sale of the railroad west of Lake City.

The original complaint alleges that F. Dibble and associates acquired possession, without paying this balance, by fraud, covin and collusion, and that all the parties, Littlefield and others, acquired all their interests as stockholders in the Jacksonville, Pensacola and Mobile Company with notice of the fraud, and the trustees had the clear equitable right to follow the property and subject it, its rents and profits and income, to the payment of this balance of purchase money, especially after it had been put into the possession of Chase *et al.* in trust to pay other debts and extend the railroad westward.

Now the complaint alleges that the Jacksonville, Pensacola and Mobile was the owner of the road east of Lake City, and had included it in its deed of trust to Chase *et al.* As a railroad is an entity, the court could not appoint a Receiver over a part of an entire road, even though the lien of plaintiffs extended to but that part of the road.

Again: The plaintiffs contend that the Jacksonville, Pensacola and Mobile Company, by purchasing with notice of the fraud, subjected all its property to the payment of the balance of purchase money.

2. Cause of action is the demand of the State of \$224,000 for the fraud of over-issuing that amount of State bonds. This was a demand by the State against the Jacksonville, Pensacola and Mobile Company, and a good cause of action itself.

The amended complaint sets forth two other causes of

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on, to wit: non-payment of interest on the four millions of road bonds held by the State, and non-payment of sink-fund due trustees on account of Internal Improvement bonds.

With all these demands against it, the Jacksonville, Pensacola and Mobile Company had put all its property in the hands of trustees to pay other simple contract debts, and to hinder their road westward, without making any provision for the plaintiffs. Both complaints allege that the Jacksonville, Pensacola and Mobile Company is insolvent, and that there is no other way to collect plaintiffs' demands save by the seizure of the railroad property and its income.

Authority as to a proper case being made for a Receiver.

A Receiver will be appointed in all cases where the management of the estate is required to meet the incumbrances, and it is at the present time being so applied as not to be wholly applicable to reduce the incumbrance." Redfield on Receivers, 4 Ed., Vol. 2, p. 361, Sec. 22.

And for this purpose the court will, through its Receiver, manage the affairs of the company for any length of time. 361-2.

As to the allegations of misapplication of the income of the company, *vide* original complaint.

The allegations of insolvency, *vide* last part of original complaint and amended complaint, alleged that several judgments have been recovered against the company, which is the best evidence of insolvency.

Where there are no persons authorized to take charge of the affairs of a corporation, or where fraud is shown or a property is in danger of being wasted or misapplied, a Receiver should be appointed." 2 Abbott's N. Y. Dig., 144; 1 Paige, 33; 3 Johns. Ch., 48; 1 Barb. Ch., 644.

Assignment of corporate property for the benefit of particular creditors is an obstruction to the rights of other creditors, and a good ground for the appointment of a Receiver." 1 Barb., 27.

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Applying the principle of the authorities cited above, the appellee submits that a strong case was made for the appointment of a Receiver.

Jurisdiction.—The appellants contend that the court below had no jurisdiction on two grounds—

1. They claim that the road east of Lake City did not belong to the Jacksonville, Pensacola and Mobile, and that no part of the road west of Lake City could be reached by the Duval county court, because it was not within the territorial limits of the Fourth Circuit.

The appellee contends that the court below had jurisdiction on three distinct grounds—

1. On the ground that the whole line of road west of Jacksonville was in possession of Chase, Gordon, &c., trustees, who were operating it as one road, and as the property of the Jacksonville, Pensacola and Mobile Company.

2. Because the road east of Lake City was consolidated with the road west, or that the Florida Central was consolidated with the Jacksonville, Pensacola and Mobile Company.

3. That the court below has jurisdiction even without consolidation.

What is consolidation? "Consolidation or amalgamation seems to imply such a consolidation of the companies as to reduce them to a common interest." Redfield on R., 2 V. 577.

Now it cannot be denied that possession and ownership constitute a complete title to property. The allegations of the complaints show beyond a doubt that the Jacksonville, Pensacola and Mobile Company, prior to October 1, 1871, had the actual possession, and on that day made a deed of trust of all the property from Jacksonville westward.

Now the complaint and amended complaint allege that Littlefield, in June, 1870, owned nearly all of the stock in the Jacksonville, Pensacola and Mobile Company. He had control of the road west of Lake City.

The complaint and amended complaint allege that Littlefield, in the spring of 1870, owned 3,110 shares of the Florida Central out of 5,510 shares, the entire stock in the company. That he contracted for nearly all the remainder of the stock, and paid for all the remainder save about 355 shares.

He, Littlefield; thus acquired the title and power of controlling the possession of both roads. What did he do? Instead of running the roads separately under two distinct organizations, he created and put in possession of the whole line the officers of the Jacksonville, Pensacola and Mobile. He, therefore, had the unity of interest and possession. The complaint (amended) alleges that he purchased the stock of the Florida Central for the purpose of effecting a consolidation. Inasmuch as he did own all the stock when he wanted to exchange bonds with the State, (which was contemporaneous with the purchase of the stock,) he called a meeting of the stockholders—they voted to issue bonds, the proceeds to be placed in Houston's hands to be applied to pay for the stock.

All the stockholders who sold out of course had no further interest in the railroad; they looked to their contract for their money, and nearly all the stock interest of the Florida Central became merged or amalgamated with the stock interest of the Jacksonville, Pensacola and Mobile, all being owned by Littlefield. Here then was a complete reduction of three companies to one common interest.

Littlefield treated the roads as consolidated, put the same men in charge of the entire line and kept them and a deed was made. To these transactions and acts of amalgamation or consolidation no one made any objection, and for good reason that it was for the interest of the stockholders of the Jacksonville, Pensacola and Mobile, and the stockholders of the Florida Central having sold out, and had no other interest to object.

There was a general acquiescence of all stockholders, and

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the "shortest acquiescence will estop any stockholder from objecting." Redfield on R., Vol. 2, 576.

Upon this state of facts it seems difficult to say that there was no consolidation in point of equity, just as much as if the stockholders had signed a written instrument to that effect. Consolidation followed from acts done.

Now a consolidation is the legal consequence of acts done by the corporators, (stockholders.) If the statute authorizes it and acts are done that amount to it, it is effected. It is in legal effect the surrendering up by one company of its franchises to the Legislature, and, *eo instanti*, a grant by the Legislature of those franchises to another company.

"A deed of transfer or articles of agreement has no effect whatever to pass the corporate franchises from one company to another. The transfer of corporate franchises is the legal result of acts done by the corporators by force and operation of the statute authorizing the transfer or consolidation. Such deed or articles of agreement are only evidence of the acts from which the legal result follows." 5 Clarke's Iowa R., 357; 22 Ohio R., 412, 428, 429; 16 Ind. R., 172; Wallace R., 25; 21 Ill., 457; 7 Ind., 369, 373; 10 ib., 93, 94; 6 ib., 318; 9 ib., 358, 359; 16 ib., 46; 11 ib., 399, 415; 30 Penn. R., 46.

In 22 Ohio cited, less than two thirds of the stockholders consented to the consolidation.

The acts of consolidation may be proved by parol; they need not be in writing. (In the case at bar the acts are alleged.)

The acts and consent of corporators may be proved by parol, though the charter directs them to be in writing, and the records of the corporation are silent. 12 Wheaton, 64, 72, 73, 74; 15 Ind., R. 55; Angell and Aimes on Cro., Sec. 284.

The law of presumption and estoppel applies to corporations the same as to individuals. 12 Wheaton, 70; Angell and Aimes on Cor., Secs. 112, 283-4.

"Acts done by corporations, which pre-suppose the existence of other acts to make them legally operative, are presumptive proof of the latter, and slight acts are held sufficient for this purpose." 12 Wheaton, 70.

If the officers of a corporation openly exercise a power which pre-supposes a delegated authority for this purpose, and other corporate acts show that the corporators must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Id.*, p. 70; *Herman on Estoppels*, Secs. 539, 540, 543.

Votes of corporators may be presumed from the existence of corporate power which pre-supposes their existence. 12 Wheaton, 71-2-3.

Corporations may surrender valuable rights without vote or deed. *Id.*, 73; 1 Pick., 297.

According to the principle of these authorities, the acts of ownership exercised over the road east of Lake City by the Jacksonville, Pensacola and Mobile Company and its officers, deed of trust, &c., indeed full corporate powers and franchises will be deemed rightful, and the law presumes that such power and franchises were duly conferred without further evidence.

Section 14 of the Act of June 24, 1870, confers upon the railroad companies authority to consolidate "on such terms as may be agreed on, and such companies are authorized to settle the terms of consolidation by arbitration or otherwise."

It will be observed that the mode and manner of consolidation is left by the statute indefinite and to the discretion of the companies, only there must be a majority assent of the parties in interest. It has already been shown that the acts of consolidation in this case were assented to by nearly all of the stockholders of the Florida Central and of the Jacksonville, Pensacola and Mobile Company.

Where a corporation have power to do an act, they may be estopped from objecting that the form they adopted was

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not the mode prescribed in the charter. 22 Com., 502; 52 Penn., 506; Hermon on Estoppels, Sec. 563.

"A corporation, by the acts of merging into another corporation, is estopped from claiming that it is a distinct and independent corporation." 5 Clarke, Iowa, 357; Hermon on Estoppels, Sec. 543; 1 Paige, 595; 8 Cowen, 387.

It is claimed that a single stockholder of a single share of stock may prevent consolidation, and that it cannot be done without his consent. It is also claimed that the fact that Mr. L'Engle brought a suit in May, 1872, shows that he did not consent; but this was two years after the actual consolidation and merging of the two companies took place, and it has not been proven yet that Mr. L'Engle is a stockholder. If he was, he is estopped, for the "shortest acquiescence will estop a stockholder from objecting." 2 Vol. Redfield, 576; 23 How., 381.

In this case a stockholder was held estopped from setting up objections to the validity of bonds issued upon the authority of less than two thirds of the stock, after the lapse of six months. 7 Ohio, N. S., 327; 6 ib., 119.

The objecting stockholder must allege and prove that he expressly dissented, and the burden of proof is not on the other side to show his assent. 8 Fla. R., 371.

The amalgamation of the two companies was acquiesced in for over two years without objection, and even Mr. L'Engle did not object till after this suit was brought. No objection was made till it was found the road had slipped from the hands of irresponsible men, who preferred to pocket the income of the road instead of paying its just debts.

"The conduct of corporations and stockholders and their acquiescence is to be viewed by the court from an external position." 23 How., 400.

It is submitted that upon the allegations in the complaint upon which this Receiver was appointed, the roads were in fact and in point of equity consolidated, and the court below was justified in so considering them.

But if there was not a consolidation there is a good cause of action and ground for appointing a Receiver over the road east of Lake City, set forth in the amended bill, that is the arrears of interest on \$1,000,000 of bonds.

If the Florida Central had a separate existence, and had so little regard for its credit and for its creditors as to allow the Jacksonville, Pensacola and Mobile to take possession of it and make a deed of trust of it, and failed to pay its interest, then, under the authorities cited above, a Receiver should be appointed. The court had jurisdiction to make the appointment; and as to the road west of Lake City, no one can raise the question of jurisdiction but the trustees in possession of the Jacksonville, Pensacola and Mobile Company. Holland cannot raise the question; he took nothing by his purchase but a bag of wind. A railroad or part of a railroad cannot be sold on execution at law.

A corporation may be sued in any county where it exercises corporate powers or franchises, and may be sued in any county where it has an office, though no part of its road is in such county. 15 Ill. R., 436; 5 Iowa R., 518, 520; 2 Richardson S. C. Law R., 512; 8 Iowa R., 260; 1 Strobart's Law R., 70; Angell and Aimes on Cor., Sec. 107; 12 Wallace, 65.

Where a corporation has an office in more than one county, suit may be brought in either. Angell and Aimes on Cor., Sec. 107, notes 2, 3; 17 Me. R., 434; 12 Grattan, 655; Ind., 25. Laws of State of Florida, (1868,) Chapter 1639, c. 24, as follows: "Suits against corporations shall be commenced only in the county where such corporation shall be or usually kept an office for the transaction of its customary business. * * * Summons shall be served on President or other chief officer of the company." Id., 25.

Under the Code of procedure of Florida, defendant may be sued in any county. If the defendant objects to the trial being held in the county where the suit is brought, he must

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apply to the court for removal to what he claims is the proper county. Code of Procedure, Act of February 19, 1870, Secs. 74-5-6-7.

It is too clear for argument that the Jacksonville, Pensacola and Mobile Railroad Company, exercising its functions in Duval county, was, under the statutes of Florida, liable to be sued in that county, and that the Circuit Court of that county had jurisdiction of the person or corporate body and the trustees of that body.

A court of chancery, with jurisdiction of the defendant, can appoint a Receiver over property even beyond its jurisdiction. Edwards on Receivers, pages 6, 7; 2 Paige's Ch. R., 615.

This power will be exercised by the court if necessary by compelling the defendants to make such assignment of it as to vest the title and possession in the Receiver. 17 How., 322; 2 Paige's Ch. R., 615. In this case the question arose touching property beyond the State of New York.

In the case of Booth vs. Clark, 17 Howard, the doctrine is admitted that in such case the court may compel the defendant to execute a deed or assignment so as to vest the title and possession in the Receiver of property not within its jurisdiction.

"He (Receiver) is the representative of the court, and may, by its direction, take into possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced to possession. The appointment of a Receiver is an equitable execution." Edwards on Receivers, p. 6; 17 How., 331; Jer. Jur. Eq., 249.

Now any execution which the State court may issue in the case after final judgment will be of "full force and effect throughout the State."

Statutes of Florida upon this subject are as follows: "If any judgment at law or decree in chancery shall be rendered against any corporation, it shall be lawful for the

plaintiffs in the suit to sue out either a distrain or *feri facias* or *elegit* as he may think proper, and said writs of *feri facias* and *elegit* may be levied as well on the current money as on the goods and chattels of said corporation." Act of Nov. 23, 1828, Sec. 58, Thompson's Dig. of the Laws of Florida, 354; Bush's Digest, 324.

"All writs of execution shall bear date as of the day on which they shall be issued, and shall be directed to all and every the sheriffs of the State of Florida, and shall be of full force throughout the State." Thompson's Digest, 355; Bush's Digest, p. 324, Sec. 3, Acts of February 17, 1833, and of March 15, 1844.

"All writs of execution upon any judgment obtained for the use of the State in any of the courts of the State in any one county, may run and be executed in any other county of the same, but shall be issued from and made returnable to the court where the judgment was obtained, any law to the contrary notwithstanding." Act of February 10, 1832, Sec. 6; Thompson's Dig., 417.

"Execution may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of the county or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold." Code of Procedure, Act February 19, 1870, Sec. 232.

These laws vest the Circuit Courts with power to reach, by a final execution or decree, any property of the defendant in any part of the State, and if such court has jurisdiction by final process over property in any part of the State, it would be a strange doctrine—indeed a judicial anomaly—to hold that such court has not jurisdiction by a proper interlocutory process over the same property before final judgment. Besides, there is a general grant of judicial

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power in the Constitution so broad and comprehensive as to leave no room for doubt on this subject. It is in the following words: "The Circuit Courts and the judges thereof shall have power to issue writs of mandamus, injunction, *quo warranto*, *certiorari*, and all other writs proper and necessary to the complete exercise of their jurisdiction." *

* * Const., Art. 6, Secs. 7, 8; Bush's Digest, 386.

Without power to take possession of property by intermediate remedial writs, the court would fail in the complete exercise of its jurisdiction by the removal or destruction of the property before final judgment.

When jurisdiction of action acquired.—"From the time of the service of the summons in a civil action or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." Code of Procedure, Sec. 90; Bush's Dig., 484.

Summons may be served anywhere within the State, and if defendant is not found within the State, service may be made by publication. Id., Secs. 85-6; Bush's Digest, 481.

The defendants err in supposing that the jurisdiction of the Circuit Courts is restricted to the counties within their respective circuits. Such courts are limited to suits brought within the circuit, but in a suit brought within the circuit such court has jurisdiction over the defendant or subject matter anywhere in the State.

If the appellants theory is right, then Judge Bryson could exercise jurisdiction only over that part of the road in his Circuit, and Judge White over that in his Circuit; therefore the road could only be sold in separate parcels. Such argument proves too much.

Supplemental Complaint.—The supplemental complaint sets forth how the Florida Central was kept on foot, to wit: by the illegal voting of some 4,410 shares of stock in the hands of Houston, which belongs to Littlefield and which the latter had paid for. It was by the voting of this stock,

without Littlefield's consent, that the Florida Central was illegally kept up. The parties claiming to be stockholders and directors are made parties defendant so that they may be compelled to show their interests and restrained from using the name of the Florida Central until their right to do so shall be ascertained. They surrendered their franchise to the Jacksonville, Pensacola and Mobile, and cannot be permitted to attempt to exercise them again by fraud and chicanery.

Doing acts or suffering acts to be done that destroy the end and object for which a corporation was created, must be regarded as equivalent to a surrender of its rights. 2 Abbott's N. Y. Digest; 19 Johns., 456; Hopkins' R., 300; 6 Cowen, 217; 17 N. Y. R., 93, *et seq.*

"The election of trustees, made apparently for no other purpose than to keep the company in existence, will not prevent a dissolution." 8 Cowen, 387.

WESTCOTT, J., delivered the opinion of the court.

Appeals are prosecuted in this case by the Florida Central Railroad Company, Daniel P. Holland, Edwin M. L'Engle, Francis F. L'Engle, F. B. Papy, George R. Foster and Theodore Hartridge.

The first question which arises under the errors assigned is, was the Judge of the Fourth Circuit qualified to hear this case?

It is insisted by defendant, Daniel P. Holland, that the Judge of the Fourth Circuit has been of counsel in this cause.

It appears from the record that Judge Archibald, before his appointment as Judge, represented the receiver in an application by the Atlantic and Gulf Railroad Company for an order for the payment of moneys due it by the receiver. This company owned a line of railway connecting with the road in the possession of the receiver, and it was claimed that he had moneys due it for through tickets and freights.

This was a matter independent of the main suit, in the

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consideration of which it was not necessary that the attorney should have formed any opinion, or to have investigated the equities of this case, or the propriety of the appointment of the receiver, or any question between the parties to this controversy, which he afterward decided as Judge.

We think there is nothing in the objection, and the challenge must fail.

We first consider the case of the Florida Central Railroad Company.

This company takes an appeal, claiming to be a party to the suit, with the right to appeal and to be heard. On the other hand, the respondents insist that it is no party, that its position is that of a person claiming title paramount, that it was not in possession when the receiver was appointed, and that it should intervene by petition to be examined *pro interesse suo*. To the original complaint the Florida Central Railroad Company was no party. This complaint alleged that the possession of the line of road from Lake City to Jacksonville was then in Chase and Flagg, trustees, who held such possession under a deed of the Jacksonville, Pensacola and Mobile Railroad Company, in which it claimed ownership of the entire line. This deed purported to convey to these parties the entire line of road for a term of two years.

If this suit had proceeded under this original complaint, it may be true, that, according to the rules of equity practice prevailing before the code, the Florida Central Railroad Company, if it claimed title paramount to the Jacksonville, Pensacola and Mobile Railroad Company, the lessor in the deed mentioned, as well as against the lessees in possession, should have intervened by petition.

But however this may have been under the original complaint we need not determine, as the same case is not presented by the amended and supplemental complaint, and the subsequent proceedings in the case. That complaint sets up, by way of supplement, that E. M. L'Engle, claiming to be

stockholder in the Jacksonville, Pensacola and Mobile Company, and in the Florida Central Company, *as two distinct corporations*, has filed a bill against the Jacksonville, Pensacola and Mobile Company and others, claiming rights to the exclusion of the plaintiffs in this cause, and that the receiver heretofore appointed in the case has been, on the application of the said L'Engle, and by order of this court, displaced as receiver of that part of the Jacksonville, Pensacola and Mobile Railroad, lying between Lake City, Florida, and Jacksonville, Florida, described in his bill as the Florida Central Railroad, and another receiver appointed in his place. From the report of receiver Greeley, filed on the 7th day of June, it appears that at the time the order of June 22d was made, the possession of what it claimed to be the Florida Central Railroad was with the agents and employees of that company under receiver Baker, he being one of the three receivers of the "earnings" of the entire line of road. This supplemental complaint also sets up that Houston and others, assuming to be the owners of stock, have held meetings of the stockholders of the said Florida Central Railroad Company, claiming that it was no part of the said Jacksonville, Pensacola and Mobile Railroad Company, and has voted said stock, although said stock did not belong to said Houston, but was the property of M. S. Littlefield.

It alleged, also, that the State of Florida, in exchanging securities, required that one million of the bonds should be executed in the name and under the seal of the Florida Central Railroad Company, and that all the necessary steps to constitute a *pro forma* consolidation between the Jacksonville, Pensacola and Mobile Company and the said Florida Central Company, as described by its original charter and enabling act, had not been taken.

One of the prayers of the amended complaint was, "that for the purpose of the decree hereinafter prayed, the said the Florida Central Railroad Company be made a party defendant hereto." We thus see that the plaintiffs in this action

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made the Florida Central Railroad Company a party to the amended complaint; that they set up the fact that such a body claimed to be in existence as a separate corporation; that persons claiming to be stockholders in such corporation were asserting that they were the holders of a subsisting stock interest; that these stockholders had, in this court caused the original receiver appointed in this case to be displaced and a new one appointed in the stockholders' suit. On the 14th day of August, A. D. 1872, the Florida Central Railroad Company, upon petition and after notice, was made a party defendant to the suit, the order being as follows: "On reading and filing the petition of the Florida Central Railroad Company, a corporation in this State, under authority by virtue of the laws thereof, and proof of due service of the notice of this motion; now, on motion of Peeler and Raney, attorneys for said Florida Central Railroad Company, Charles P. Cooper, acting attorney-general, appearing for the plaintiffs, it is ordered that the said Florida Central Railroad Company be made a party defendant herein, and the summons and complaint be amended accordingly, and that the cause proceed in like manner as if the said Florida Central Railroad Company had originally been made a party defendant herein." On the 3d of September, A. D. 1872, this defendant filed its answer to the amended complaint. In the final decree from which this appeal is prosecuted it is considered by the court, and is thereby adjudged, that the Florida Central Railroad Company shall be held and deemed to be consolidated with the Jacksonville, Pensacola and Mobile Railroad Company, thereby determining the principal issue raised by the pleadings of this defendant, and which, according to the pleadings, was a very important question in the case. Under the provisions of the code, an amended pleading takes the place of and supersedes the original, (4 Howard, 174; 12 How., 521; 5 Duer, 656.) and the amendment of the complaint relates back to the commencement of the action. This is true of the amended complaint, except

so far as it alleges supplemental matter, and that of course cannot be a substitute for the original. Under the provisions of the code, "any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." In this cause, the Trustees of the Internal Improvement Fund seek to subject the line of railway extending from Lake City to Jacksonville to its claims against the Jacksonville, Pensacola and Mobile Railroad Company, one of the grounds being that such line of railway is the property of said company, while in their complaint they set up that there are persons claiming to be owners of such road other than their debtor, and that there is a corporation alleged to be in existence as the owner of said line of railway other than the Jacksonville, Pensacola and Mobile Railroad Company. It appears from the complaint, that consolidation was questioned by persons claiming to be stockholders and a body claiming to be a corporation. They also claim as against this alleged pretended organization, that its incorporators have failed to comply with the conditions of sale attending their purchase of said line of railway. For the purpose of contesting these and the other questions involved in this controversy, the plaintiff named the Florida Central Railroad Company a party, and, by a subsequent order of the court, it was made a party upon its petition after notice. It subsequently filed its answer, and it is as much bound by the final judgment in this case as any party can be. It is therefore in a condition to appeal from the orders and judgment in this case, and to raise any question which any party appellant can raise under the rules controlling the subject.

As to the appellant, Daniel P. Holland, it is only necessary to say that he is expressly named a party defendant in the supplemental complaint of plaintiffs, filed March 25th, 1874; that he was then in possession of the line of railway extending from Lake City to Quincy, claiming to hold it by

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a title superior to that of each of the plaintiffs in this suit that this property, thus in his possession, was the subject-matter of this litigation, and that upon the day of filing the supplemental complaint, the plaintiff, the Trustees of the Internal Improvement Fund, applied for and obtained an injunction against him as defendant, Daniel P. Hollard. The other appellants are likewise parties to the supplemental bill. Some of these parties had not been served with process before entering their appeal. This, however, makes no difference, as they can appear voluntarily, and take such action as a party served with process can take. (Danl. Chy. Prac., 560-561; 8 Paige, 45; 1 Smith Chy. Prac. 158; 2 Mad. Chy., 206.) These parties are before this court, therefore, as appellants, entitled to be heard in respect to every question which they can properly raise upon such an appeal as they have taken.

The appeal in this case is taken from a final decree, and the rule announced by this court repeatedly is that such an appeal brings up the whole merits of the cause, and the previous proceedings generally. (2 Fla., 301-2; 4 Fla., 363-4; 9 Fla., 50; 10 Ohio, (State,) 511; 9 Wis., 495; 17 Mrid., 231; 17 John., 559; 1 John Cas., 498.) Such, too, is likewise the rule of the code.

We come now to the consideration of the case of the Trustees of the Internal Improvement Fund and the Florida Central Railroad Company.

Under the provisions of the act of January 6, 1855, entitled "An act to provide for and encourage a liberal system of internal improvements in this State," a line of railway from Jacksonville to the waters of the Pensacola Bay, with an extension to St. Marks, was designated as a proper improvement to be aided from the Internal Improvement Fund, in the manner provided in said act. Two companies controlling a part each of that line, the Pensacola and Georgia Railroad Company and the Florida, Atlantic and Gulf Central Railroad Company, having accepted the provisions

of that act, issued bonds under the third section thereof. This section provided that "all bonds issued under the provisions of this act shall be a first lien or mortgage on the road-bed, iron, equipment, work-shops, depots and franchise; and upon the failure upon the part of any railroad company accepting the provisions of this act to provide the interest, as herein provided, on the bonds issued by said company, and the sum of one per cent. per annum as a sinking fund, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder, either for cash or additional approved security, as they may think most advantageous for the interest of the Internal Improvement Fund and the bondholders. The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking fund; Provided that, in making such sale, it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent semi-annually to the sinking fund, until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase and the forfeiture of the purchase money paid in."

The Florida, Atlantic and Gulf Central Railroad Company, owing the line of road from Lake City to Jacksonville, having failed to comply with the requirements of the act as to the interest and sinking fund upon its bonds, was sold by the trustees on the fourth of March, A. D. 1868, William E. Jackson and his associates becoming the purchasers. The complaint alleges that there were outstanding bonds, and that such purchasers have failed to continue the payment of the sinking fund, as required by law. William E. Jackson and his associates, after their purchase, were made a body politic and corporate, to operate said line of road, under the name of the Florida Central Railroad Com-

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pany. This company, as to this allegation of the complaint, answers that the road was purchased by William E. Jackson and his associates for the sum of one hundred and eleven thousand dollars; that this amount was paid; that nearly all of the bonds of the Florida, Atlantic and Gulf Central Railroad Company were paid in to the trustees by the purchasers (being rated at about twenty cents on the one hundred) and cancelled, leaving outstanding, upon which the were required to pay a sinking fund, only about one hundred and twenty thousand dollars of bonds.

That Edward Houston was appointed the agent of the trustees to take up the outstanding bonds, and that said agent has, from time to time, as fast as he could obtain information of their whereabouts, taken up said bonds, and that there is now outstanding only about twenty thousand dollars of these bonds. That the sinking fund due by this defendant was paid up to the fourth of March, A. D. 1870, and that said Houston, the said agent of the trustees, had in his hands, on the 16th of May, A. D. 1872, to the credit of this defendant, on account of said sinking fund, six hundred and thirty dollars, and that there was nothing due by this defendant, on account of said sinking fund, at the time of filing said complaint. So far, therefore, as the matter of the non-payment of this sinking fund is concerned, the record before the court below presented an issue of fact, and such was the state of the record at the time of the final decree, *no testimony was ever taken.*

The trustees, in addition to this, set up another claim in their complaints, amended and supplemental against this line of road, upon the basis of the consolidation and amalgamation of the Florida Central Railroad Company with the Jacksonville, Pensacola and Mobile Railroad Company. The trustees allege that the Tallahassee Railroad Company and the Jacksonville, Pensacola and Mobile Railroad Company were indebted to them for a balance of unpaid purchase money, due on account of the sale of the line of road

tending from Tallahassee to St. Marks, and from Lake City to Quincy; that the line of road from Quincy to Lake City had been constructed and owned by the Pensacola and Georgia Railroad Company, and the road from Tallahassee to St. Marks had been constructed by the Tallahassee Railroad Company.

That the two last named companies had accepted the provisions of the Internal Improvement Act, and had issued mortgage bonds on their respective lines of road. That, failing to pay the interest and sinking fund, as required by law, the roads were seized and sold. That there is a large balance of the purchase money for these roads due and unpaid by the purchasers thereof, and that there have been no payments made by them on account of the sinking fund. That, subsequent to this sale, the Jacksonville, Pensacola and Mobile Railroad Company was incorporated, with power to complete, equip and maintain a connection by railway between Jacksonville and Pensacola; and that, under said act, the several corporations owning any part of this line might be consolidated by a majority vote of the stock; and that the companies owning the lines of railway from Quincy to Lake City, and from Tallahassee to St. Marks, and from Lake City to Jacksonville, have been consolidated and amalgamated with the Jacksonville, Pensacola and Mobile Railroad Company, whose owners and incorporators, together with the said line of railway, are liable for the balance of the unpaid purchase money due the trustees, and the sinking fund due on the outstanding bonds. The last supplemental complaint, filed after the answer of the Florida Central Railroad Company, sets up other and additional facts as to the matter of consolidation, but its effect cannot be more than to make an issue of fact.

The claims of the trustees arising out of the balance due on the purchase of the roads from Quincy to Lake City and from Tallahassee to St. Marks, can exist against the road from Lake City to Jacksonville only upon the hypothesis

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that it is the property of their debtor, the Jacksonville, Pensacola and Mobile Railroad Company, or through some relation of the Jacksonville, Pensacola and Mobile Railroad Company to said property, and not from anything arising from the bonds issued under the act of January 6, 1855, *by other companies.*

It is too plain for argument that bonds issued by the Pensacola and Georgia Railroad Company, and the Tallahassee Railroad Company, are not in any way a lien on the road from Lake City to Jacksonville. This claim of the trustees it is thus seen, is based upon the alleged amalgamation of the Florida Central Company with the Jacksonville, Pensacola and Mobile Railroad Company. Without narrating at length the facts stated in the answer of the Florida Central Railroad Company, it is enough to say that its effect is to put in issue this fact of consolidation, which is the whole foundation of the claim of the trustees to subject it to sale, to pay the balance of the purchase money due on the sale of the other lines of road. So far as the trustees are concerned in their relations to the alleged Florida Central Railroad Company, it is thus apparent that at the time the final decree or judgment was rendered in this case, all the facts which constituted the basis of their claim against that alleged company, its incorporators, or the line of road which it claimed to own, were at issue under the pleadings in the case.

With the pleadings in this condition, and without notice or opportunity for hearing the final decree against the Florida Central Railroad Company was entered, and for these reasons it must be reversed as to the trustees.

In behalf of the State nothing is decreed, except that the Florida Central Railroad Company is consolidated with the Jacksonville, Pensacola and Mobile Railroad Company, and as that fact was in issue between the State and this alleged company under the pleadings, and the judgment was rendered without notice, evidence, or an opportunity for hearing, and without default, in the same manner as the judg-

ment was rendered in behalf of the trustees, it must likewise be reversed as to that alleged company. It was entirely inconsistent with and in violation of the simplest principles prevailing in courts accustomed to the due and orderly administration of justice for the Circuit Court of Duval county, thus, in the face of these issues, without testimony, and without notice and without default in pleading, to pass a final judgment affecting the rights of a party which was, by its own order and after due notice, brought into the case. These facts are embraced in the issue made by the pleadings. We must, as the court below should have done, leave them to be determined in the usual method, and recognize the impropriety of any attempt on our part to determine them as the case is now presented here.

The next case we consider is that of defendant Daniel P. Holland and the trustees.

On the 24th of March, A. D. 1874, the plaintiffs filed a supplemental complaint, in which Daniel P. Holland was named a party defendant, reciting that since the filing of the amended complaint, and about the 2d day of December, A. D. 1872, the said Holland recovered a judgment against the Jacksonville, Pensacola and Mobile Railroad Company, in the Circuit Court of the United States for the Northern District of Florida, for the sum of about sixty thousand dollars, caused execution to be issued thereon, and levied the same upon the equity of redemption of the railroad and appurtenances and property of the Jacksonville, Pensacola and Mobile Railroad Company west of Lake City, and that this property was sold on the first Monday of May, A. D. 1873, the said Holland becoming the purchaser, crediting the amount of the bid on the execution. That soon thereafter he acquired the possession of the railroad of the Jacksonville, Pensacola and Mobile Railroad Company, and has ever since retained possession thereof, receiving the rents and tolls therefrom; that such line of roads and property had been taken possession of by J. C. Greeley, the receiver

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heretofore appointed in this cause; that said Greeley had never been discharged, and that such act of the said Holland was in contempt of this court and its orders.

That about the last of May, 1872, Francis B. Papy, an employee of said Receiver, accepted the appointment of Receiver by the Judge of the Second Judicial Circuit of Florida, made in a suit instituted by holders of first mortgage bonds of the Pensacola and Georgia Railroad Company against the Jacksonville, Pensacola and Mobile Railroad Company and the Trustees of the Internal Improvement Fund.

That in July, 1872, other first mortgage bondholders brought a suit in said United States Court against the Jacksonville, Pensacola and Mobile Railroad Company and the said trustees, and on the 19th of December the said Jacksonville, Pensacola and Mobile Railroad Company withdrawing its answer, and the suit being dismissed as to the trustees, who plead to the jurisdiction, a decree *pro confesso* was taken against the Jacksonville, Pensacola and Mobile Railroad Company; that these proceedings in said United States Court are more fully set forth in a bill in equity, brought by the State of Florida against said first mortgage bondholders, Daniel P. Holland and others, in the Supreme Court of the United States, and therein now pending, a true copy whereof, and of the writ of injunction therein granted, is hereto attached, and prayed to be taken as a part of this supplemental complaint, as fully as if specially set forth herein. That the complainants, who had so obtained the decree *pro confesso* against the said company, entered into an agreement with said company, whereby complainants in said decree and in said suit, wherein Papy was appointed Receiver, agreed to dismiss the last mentioned suit, to discharge said Papy, and allow said company time to pay the amount of said decree; that afterwards, by concert of action between the complainants in the two suits with the marshal of said district, said Papy was discharged as Receiver, and

it wherein he was appointed, dismissed, and said mar-
contemporaneously with said Papy's discharge, levied
aid decree of the 19th of December on said property
of Lake City, and advertised the same for sale on the
ay of July, A. D. 1873, which sale was postponed to
ry 1st, 1874, under an agreement with said Holland.
before the levy of said decree by said Conant, he was
written notice of the appointment of Receiver Gree-
nd of his right to actual possession, and that after levy
d decree the said Greeley was kept out of possession.
at after said sale to Holland and the postponement of
ale under the decree, said Holland employed said
it ostensibly as manager, and the said Conant, as such
ided manager, still claims to be in possession of said
rty with said Holland. That said Conant has been
ed as marshal, and the said bondholders as plaintiffs,
any further proceedings under said decree, and that
Conant is not authorized by the decree under which he
s to have made said levy, to receive the tolls of said
ad, nor to interfere with its management. That said
nd has filed his answer in said suit in the Supreme
of the United States, a copy of which is herewith
wherein he questions the jurisdiction of this Court as
it part of the road lying west of Lake City, although
jurisdiction has never been questioned by the Jackson-
Pensacola and Mobile Railroad Company. That all
se proceedings of the said Holland are in contempt of
rders of this court, and that the said Holland, as the
ey of the Jacksonville, Pensacola and Mobile Rail-
Company, had full notice of the orders of this court in
ehalf; and that said Holland is insolvent and without
rty in this State or elsewhere, subject to judicial sale.
xm the answer of defendant Holland to the bill in
r of the State of Florida in the Supreme Court of the
d States, which is made an exhibit to this supplemental
aint, it appears that Holland, in that court, questions

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the validity and legality of the State bonds as well as the alleged lien of the trustees.

It also appears that, upon the filing of the bill in the Supreme Court of the United States, the plaintiff (the State of Florida, in her own right as well as in right of the trustees,) entered a motion for a preliminary injunction and the appointment of a Receiver, as prayed for in its said bill. The special writ of injunction prayed for was to command said Holland to vacate the possession of the Jacksonville, Pensacola and Mobile Railroad, and to desist from further intermeddling with any of the property of the Jacksonville, Pensacola and Mobile Railroad Company, and to deliver the same to said Jonathan C. Greeley, the Receiver of said property, or in lieu thereof, that the court appoint a Receiver of all of the property of the Jacksonville, Pensacola and Mobile Railroad Company situated west of Lake City. The court upon this motion failed to appoint a Receiver, and ordered defendant Holland to account for all the sums received by him from the earnings of said road, and to make monthly statements of such sums as he would receive in future. At the time of filing this supplemental complaint against defendant Holland, it thus appears that he was in possession of the road west of Lake City, and had been, upon the motion of one of the plaintiffs in this cause, ordered to render an account of his past and future receipts from the road, the court having denied a motion for the appointment of a Receiver, and having refused to order defendant Holland to deliver possession to Receiver Greeley.

This supplemental complaint was filed on the 24th of March, A. D. 1874. With it was filed an *ex parte* affidavit of M. S. Littlefield, giving a detailed statement of facts in reference to the matter of consolidation, the exchange of securities between the State and the companies, as well as a history of the judicial proceedings in reference to the line of railway involved in this suit. With it was also filed an affidavit of H. Bisbee, stating the insolvency of the parties in

possession of the property, and giving the amount of interest due on the bonds of the companies held by the State. Upon the same day, and upon the application of the Trustees of the Internal Improvement Fund, and without notice to defendant Holland, the court passed an order and decree commanding him, his agents and employees to desist from any further intermeddling with the possession of the line of road from Lake City, Florida, to the Apalachicola river, and from exercising any control over any of the engines, cars, etc., appertaining to the said road, as well as from removing any of said property out of the State. The court also decreed "that you, the said Holland, do desist from, and you are hereby enjoined and restrained from instituting any suits at law or in equity in any court or place for the purpose of asserting or claiming any right, title, or interest in, to, or of any part of said railroad, rolling stock and appurtenances, until the further order of this court." This order is served upon Sherman Conant, manager of said Jacksonville, Pensacola and Mobile Railroad, upon the various officers upon the line of road, and upon defendant Holland, on April 1, A. D. 1874.

Upon the application of the trustees, and without notice, the court upon the same day then ordered defendant Holland to deliver possession. This order is served and returned. The Receiver, Greeley, then reports to the court that he had passed over the line of the road on the 25th of March, taking possession of the line of road to Tallahassee, at which place the superintendent of the road failed to yield possession, and telegraphed the agents along the line of road not to obey the Receiver's orders.

On the 28th of March, A. D. 1874, the court entered an order directed to all and singular the sheriffs of the State, commanding them to put the Receiver in possession of the road lying west of Lake City. Then follows a rule to show cause (directed to defendant Holland) why he should not be attached for a contempt in violating the order of the court

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of March 20th, A. D. 1872, appointing J. C. Greeley Receiver, in interfering with his possession and enjoining him from intermeddling with the possession of said Receiver. No final action appears to have been taken in this proceeding.

On the 2d April, A. D. 1874, on the motion of plaintiff and after notice duly served upon the Jacksonville, Pensacola and Mobile Railroad Company, the answer of that company was adjudged frivolous, as an answer to the claim and demand of the Trustees of the Internal Improvement Fund and an order made declaring said trustees entitled to judgment and decree against said company, for the amount due on the balance of the purchase money due on the sale of the Pensacola and Georgia and the Tallahassee Railroads. On the same day the final judgment was entered.

This judgment is entered on the motion of the Trustees of the Internal Improvement Fund. The first portion of it decrees that the trustees do have and recover of the Jacksonville, Pensacola and Mobile Railroad Company the sum of six hundred and sixty-one thousand eight hundred and forty-five dollars and fifty-five cents, together with costs.

The court then decrees that this sum shall be held and deemed to be against the said company, and all persons claiming through or under it, a lien upon all the property owned by or belonging to said company at the date of the commencement of this action; that the Receiver, J. C. Greeley, heretofore appointed in this cause, be continued; that all the net income derived from said line of road be paid over by him to the treasurer of the trustees; that the Receiver continue to discharge his duties as Receiver of the line of road until the further order of the court; and that the clerk of every county in which this decree may be recorded do issue, in behalf of the plaintiffs, the trustees, against the goods and chattels, lands and tenements of the Jacksonville, Pensacola and Mobile Railroad Company, the writ of *elegit* or the writ of *fieri facias* for the aforesaid

um of six hundred and sixty-one thousand eight hundred and forty-five dollars, upon the præcipe of the attorney in his cause.

It is thus seen that the court, without service of process or notice, or opportunity to answer the supplemental complaint on the part of the defendant Holland, entered an interlocutory order decreeing against his right to possession; and afterward without notice, and before the time for answering the complaint expired, and in ten days after filing the supplemental pleading which made him a party, entered final judgment and decree, determining against his rights to the property.

That plaintiffs think his claim is nothing makes no difference. The court must hear him before it proceeds thus finally to dispose of his rights. These orders determining the right to possession, and the final decree adjudging the right, must be reversed, in so far as they affect defendant Holland as having been made without notice or opportunity or hearing.

We next come to the consideration of the appeal and case of defendant E. M. L'Engle. He assigns for error the order of June 24th, A. D. 1872, the order of March 25th, 1874, the final judgment rendered herein on the 2d of April, A. D. 1874, and the order of April 13th, 1874.

The order of June 24th followed the filing of the amended complaint of June 22, 1872, and directs this defendant "to consolidate his suit herewith, or come in as a party defendant hereto."

In the second amended and supplemental complaint, L'Engle is named a party defendant. On the 14th day of April, several days after the entry of the final judgment, and all the orders from which he appeals, he is served with summons. He has, as such party, taken this his appeal, and has thus, under the supplemental complaint, come in as party defendant.

This is, a compliance with the order of June 24th, which

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is in the alternative, and we can see no ground for a reversal of this order in this respect. As a party, he can interpose such defense as he thinks his case, whatever it may be, justified. What his case is, the record now before this court does not disclose beyond the fact that plaintiffs allege that he is a stockholder in and officer of the Florida Central Railroad Company, as well as a stockholder in the Jacksonville, Pensacola and Mobile Railroad Company, claiming rights adverse to the plaintiffs in this suit.

The order of March 25, 1874, was in part based upon the view that the order displacing Greeley and appointing Baker was void; that the original order appointing Greeley was a subsisting order, and that Greeley had the right to the possession. We need not repeat here what we subsequently say as to the matter of the receivership. For the reasons there given, we have determined that this order was not void, and its effect was to remove Greeley. Greeley's power as Receiver, under the order of June 22, 1872, being suspended and superseded by the appeal, it was error in the court to direct the parties in possession, who assumed to be officers and agents of the Florida Central Railroad Company, to deliver possession to him. So far as it purports to make an original appointment of a Receiver upon the supplemental pleadings, we cannot see that the case by them is any stronger than that made by the complaint. In fact, so far as this road was concerned, nearly every material allegation made by the trustees in the complaint was put in issue by its answer. The matter of consolidation was denied, as also was the allegation that there was something due the sinking fund by the purchasers of this road. In addition to this, the supplemental complaint is not sworn to, and the appointment, if considered an original appointment, was made without notice. We deem it unnecessary to repeat here the views expressed upon this subject, and refer to the subsequent portion of this opinion upon the subject of the appointment of a Receiver.

to the final judgment herein rendered, it must be reversed in so far as it affects this defendant, because it is rendered without hearing or opportunity for the same before the issuance of summons even, and without opportunity to answer the supplemental complaint, in which he was named as defendant, and thereby brought into the suit. The order of the 13th, A. D. 1874, is an injunction directing this defendant to cease intermeddling with the line of road between Pensacola City and Jacksonville, from bringing any suit at law or equity for the purpose of asserting any right to said property either as stockholder or otherwise, from using the name of the Florida Central Railroad Company, from in any manner appearing in, pleading in, or defending this action, and from appealing from any order in this cause, or from this or any that may hereafter be made in the name of the Florida Central Railroad Company, from voting, using, or interfering with the possession of any stock of the corporation formerly known as the Florida Central Railroad Company. As far as this order is based upon and is supplementary to the final judgment herein rendered, it must be reversed, for the reason that this judgment upon which it is founded must be reversed. The other assumption upon which this order was made was that the officers of the Florida Central Railroad Company were wrongfully in possession, and that the original order appointing Greeley was in force. This assumption, as we subsequently show, is wrong, and he could not have been entitled to possession under the order of the 22nd, A. D. 1872, as that had been suspended. So far as this order is based upon the assumption of consolidation, it must be reversed, because that question was in issue under the pleadings. Nor can we see any ground for such action on the part of the trustees, as the bonds of the Pensacola and Jacksonville Railroad Company and of the Tallahassee Railroad Company were no lien upon the road from Jacksonville to Pensacola City. That portion of the order which enjoins this

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defendant from taking an appeal in this suit is certainly very extraordinary in its character.

As to the defendants, F. B. Papy and George R. Foster, the record discloses that they were simply employees of the Florida Central Railroad Company, claiming no property in the subject matter of this suit, mere agents discharging duties directed by their principal, and therefore no necessary parties to the suit. All the proceedings against them, so far as they are the subject of appeal, are based upon the view that the original order appointing Greeley was still in force. This we have already remarked was erroneous. These orders being reversed at the suit of the Florida Central Railroad Company, they necessarily fail as to its officers, for it is through them that it is operated and managed.

As to the defendants Hartridge and Francis F. L'Engle, we cannot see that they are mentioned in the record otherwise than as parties claiming to be directors in the Florida Central Railroad Company. The judgment and all of these orders being reversed as to it, it follows necessarily that they fail as to its assumed directory. So far as they are stockholders, the court should not have made a decree affecting their rights without a hearing. There is no just foundation in law for these extraordinary proceedings. This suit must be dealt with as any other ordinary action. Under the pleadings in this case, the several matters of fact stated are in controversy. These questions must be tried, not assumed.

We now reach the last question in this controversy, upon which, in these appeals, it is necessary for us to express an opinion. This is the matter of the appointment of the Receiver. This appointment is resisted upon different grounds by the two appellants, the Florida Central Railroad Company and Holland, each of these parties claiming to own different parts of this line of railway. We first examine the question as to the Florida Central Railroad Company. That company was a party to the amended complaint, and the first question in reference to this matter which arises upon the

amended complaint is in whose possession was the line of road which it claims to own? J. C. Greeley had been appointed Receiver in this suit on the 20th of March, A. D. 1872. Subsequently a suit was brought in this court, (the Circuit Court of Duval county,) by E. M. L'Engle against the Jacksonville, Pensacola and Mobile Railroad Company and Florida Central Railroad Company and others. In this suit he claimed to be a stockholder in the two companies as two distinct corporations, alleging fraud and extravagant waste on the part of said corporation in the management of its affairs, charging fraud upon the State officers, and claiming rights and interests to the exclusion of the plaintiffs in this suit. On the application of L'Engle in his suit, Greeley, who had been appointed in this suit, was, by order of the Circuit Court of Duval county "displaced as Receiver of that part of the Jacksonville, Pensacola and Mobile Railroad lying between Lake City, Florida, and Jacksonville, Florida, described in his bill as the Florida Central Railroad, and another Receiver appointed in his place." The complaint then recites the appointment of another Receiver of the line of road west of Lake City by the Circuit Court of the Second Judicial Circuit of Florida, and alleges that there were then three Receivers of the "earnings" of the Jacksonville, Pensacola and Mobile Railroad Company. These are the allegations of plaintiffs in their amended complaint. It appears then that this court had in another case appointed another Receiver, instead of the Receiver originally appointed in this case, who had been displaced by this order made in the suit of L'Engle, and that this (his suit) was against these corporations and the officers of the State and others. A Receiver does not represent the plaintiffs in a suit, and the court should not in a subsequent suit displace a Receiver appointed in a prior suit, affecting the same subject matter. This we state as a general rule of convenience, and do not mean to say that under some circumstances it might not be proper. The proper course, as a

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general rule of practice, is to extend the receivership in the first suit over the second, subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receivership was granted. If, however, a different Receiver is appointed in the second suit, then the plaintiffs may claim that the Receiver in the former shall deliver to the Receiver appointed in his suit. (10 Paige, 47-8; 1 Barb. Ch. Rep., 268; 1 Hogan, 199, 258; 2 Paige, 342.)

The order appointing Baker Receiver, made in the suit of L'Engle, may have been erroneous and irregular, but no appeal is taken in that case, and in the absence of such appeal, it cannot be reversed or affirmed here. In the absence of the record in that case, neither this court nor the Duval Circuit Court can determine whether the case made by the bill justified this action. The proposition that the order displacing Greeley and appointing Baker Receiver is void, because not made in the same suit in which Greeley was appointed, cannot be sustained. If the court had jurisdiction of each of the cases and of both of the Receivers, then the removal of the one and the appointment of the other in either case cannot be void, for the reason that it is not made in either particular case. If the court had jurisdiction to appoint one, it had jurisdiction to remove him and appoint the other, and the order appointing Baker is not here for review. The cases cited by the respondents are cases in different courts, and the basis of the decisions is the well recognized principle that between courts of concurrent jurisdiction, the court that first obtained possession of the controversy, or of the property in dispute, must be allowed to dispose of it finally without interruption from the co-ordinate court. (20 How., 595-6.)

The authority cited in reference to the possession of a Receiver (14 How., 65) is to the effect that any attempt to disturb such possession, *without leave of the court first obtained,*

will be a contempt, and that when property is in the custody of a court of chancery, a sale under an execution issuing from another court is void. Here, however, the Receiver was displaced by the same court that appointed him. The action was not without leave of the court, but was by order of the same court that placed him in possession. The respondents here affirm that the order of June 22d, 1872, does not purport to appoint Greeley Receiver, but simply vacates the appointment of Baker, and directs that Greeley be held and regarded as such Receiver of the whole line of road, and that he is still Receiver under the original order, and that no appointment of a Receiver, under the order of the 22d of June, is here for review, as none was made. As much importance is given to this position, we will examine it at some length, although we think it a very simple matter. In addition to the allegations of the complaint, stating that a Receiver had been appointed by this court in the case of L'Engle and the former Receiver displaced, we find a report of the Receiver Greeley, filed on the 7th of June, A. D. 1872, in which he states "that the Florida Central Railroad, in the hands of Receiver J. M. Baker, collects a portion of the freight and passage due to and belonging to the Jacksonville, Pensacola and Mobile Railroad Company; that the business on the line of road is such that the agents of such road receive the whole amounts of the entire distance traveled; that this Receiver cannot obey the orders of this court unless all the moneys belonging to the Jacksonville, Pensacola and Mobile Railroad Company are paid over to him when collected by any officer or agent of the Florida Central Railroad Company, under said Receiver James M. Baker." He then prayed an order directing Receiver Baker to pay to Receiver Greeley all moneys arising from freights or passengers carried over any part of the line of road from Lake City to the Apalachicola river. The court thereupon ordered James M. Baker, the Receiver of the Florida Central Railroad, to require all agents and employees of the Florida Central Railroad Com-

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pany to pay all such moneys to the Receiver James M. Baker, and directed him to pay such moneys to Receiver Greeley. It is thus seen, from the record in this case, that, as a matter of fact, the Receiver, Greeley, was not in possession; that he had been displaced, and an order made appointing another person Receiver of the earnings of this road, and that the road was in possession of the "agents and employees of the Florida Central Railroad Company." It is clear that the order in the L'Engle suit was not void, and the necessary result is, that if Greeley was not appointed under the order of June 22d, A. D. 1872, Receiver of this road, he was no Receiver at all, for he certainly had been displaced according to the allegations of the complaint and the order of the court of the 7th of June, made in this case. The order of the 22d of June directs that the order appointing James M. Baker Receiver of so much of said railroad as was east of Lake City be vacated, as prayed for, and Jonathan C. Greeley be held and regarded as such Receiver of the whole line of road. Its legal effect is "an order reappointing Greeley" Receiver of the road from Jacksonville to Lake City, and vacating the previous order appointing Baker such Receiver. All presumptions are in favor of the propriety of the action of the court, in the absence of the record in the suit of L'Engle. We cannot, collaterally, in this suit, determine otherwise. If the matter was within the jurisdiction of the court, and no question of jurisdiction is raised by appellant, "it is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court." From the nature of the case of L'Engle, as stated in the complaint, the report of Receiver Greeley, on the 7th of June, and the order of the court of that date, it is apparent that the Florida Central Railroad Company was a defendant in the L'Engle suit, and that

the suit was by a stockholder in the Jacksonville, Pensacola and Mobile Railroad Company, and the Florida Central Railroad Company, seeking the appointment of a Receiver, and that the action was brought upon the hypothesis of no amalgamation of the two roads. It was apparent, from the allegations of the bill, that the matter of consolidation was disputed, both by what assumed to be the company, as well as persons claiming to be *bona fide* stockholders. This company was itself named a defendant in the complaint. What was the case made by the complaint? The prayer of the original complaint was for a simple judgment against the Jacksonville, Pensacola and Mobile Railroad Company for a Receiver of the road and of the stock of the two companies, with power to vote the stock, for a sale of the stock, and for an injunction. No relief was prayed in behalf of the State of Florida. The prayer of the amended complaint it is difficult to understand. It prayed a sale of the road, the receiver to announce, as conditions of the sale, "that said railroad is sold, subject to the same rights of the Trustees of the Internal Improvement Fund, under said act of 1855, that heretofore existed to enforce the payment to the fund from the said road, as well as what may hereafter fall due, according to the terms of said act of 1855, and upon the condition that the purchaser buys the road subject to the claim of the State of Florida, growing out of the exchange of securities, as fully and amply as though such had not taken place." The most that can be said of this prayer of the complaint, original and supplemental, is, that they pray for judgment in behalf of the trustees, and a sale of the road to satisfy that judgment, and for a Receiver. No judgment or relief was prayed in behalf of the State. It is a rule of the code that if there be no answer, the relief granted cannot exceed that which is demanded in the complaint, even where the defendant makes no defence. In this case, the State, in the absence of an answer, would have been entitled to no decree; and in the absence of an answer, no order

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should have been passed by the court, in view of the equities of the State, as set forth in the bill, when the State asked no relief, and had apparently made herself a party for no other reason than to show her assent to the action of the trustees. The State having asked no final decree, based upon her equities, could not have a Receiver appointed at her instance, which should only be done to have the property in the custody of the law, to meet a judgment based upon her equities. Not only is this true of the complaints, original and supplemental, but it is also true that the final judgment entered in this case is in behalf of the trustees, with the exception that it recites that it is decreed, in behalf of the State, that there is a consolidation. And if that is all the decree it sought, this certainly could not justify the appointment of a Receiver. The State, also, in its bill in the Supreme Court of the United States, alleges that this suit was brought "for the purpose of recovering the balance of the purchase money" aforesaid, (that is, the sum due the trustees,) to-wit, "the sum of four hundred and seventy-two thousand dollars, with interest;" and the amended and original complaints in this action are there filed as exhibits. There are other allegations of the State in its bill in the Supreme Court of the United States which manifest the like purpose, but, as we have said before, it is sufficiently apparent on the face of the original and amended complaints on file on the 22d day of June, A. D. 1872. Assuming, for the purpose of disposing of this question, that there was a lien in behalf of the trustees, to the extent of the first mortgage bond debt of the Pensacola and Georgia Railroad Company, it is very clear that this lien did not extend beyond the line of the former Pensacola and Georgia Railroad. A mortgagee cannot be said to have any equitable rights looking to receivership in the property of the mortgagor, beyond that included in the mortgage. Whether there was consolidation or not, the lien of the trustees did not extend beyond the property embraced in the mortgage; and the road from Lake City &

Jacksonville was not therein. The complaint claims no balance of purchase money as due from the purchasers of the road at the sale under the act of January 6, 1855, and only states that such purchasers have not complied with the condition of the sale as to continuing the payment of the sinking fund upon the outstanding bonds. It fails to state what amount of bonds are outstanding, and only states that the total amount due the sinking fund by the purchasers of the several roads was about thirteen thousand five hundred dollars. What portion of this was due by the purchasers of this line of road is nowhere stated. The act of January 6, 1855, provided that these purchasers should be bound to continue the payment of the sinking fund, under the penalty of an annulment of the contract of purchase, and the forfeiture of the purchase money paid in. The allegations of the complaint are so uncertain and indefinite as to this matter, as to give no amount as due by these purchasers. Granting, for the purpose of disposing of this question, that this penalty and forfeiture might have been enforced at the hearing in the event the proof sustained these allegations, still we cannot see that it was either necessary or expedient for the court to take possession of this property, and appoint a manager of a line of railway in the meantime, or that such injury was to be apprehended by a short delay as justified the court in dispensing with notice to the parties defendant. "As a general rule, a Receiver should not be appointed without notice to the opposite party." Formerly, the practice was not to appoint before answer. Except under very exceptional circumstances, an application for a Receiver should not be considered when made without notice. A case of great urgency should be made to appear. (Kerr on Receivers, 137 and citations.) In this case, the appointment of Greeley over Baker was contrary to the general rule; and as it appeared on the face of the complaint that the Florida Central Railroad Company claimed to own this property, we think it was an improper exercise of discretion

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by the court to make such an appointment with or without notice to it, and especially is this true in the light of the order of June 7, in this case, from which it appears that this line of road was at that time in possession of the agents and employees of the Florida Central Railroad Company, with directions to pay the earnings thereof to the Receiver Baker, and Receiver Baker is called in the complaint a Receiver of the "earnings" of this road. It is our conclusion that the case made by the complaint, considered in connection with the last action of the court in this case on the 7th of June, and of the proceedings then before the court, so far as they appeared in this record at that time, did not justify the appointment of a Receiver as against the Florida Central Railroad Company, and that there is no sufficient reason disclosed in this record for the removal of Baker, the Receiver of the "earnings" of the Florida Central Railroad Company, and the appointment of Greeley, as manager of the road, as distinct from a Receiver of its tolls.

Having thus disposed of the question of receivership, as to this line of road, we consider the question in reference to defendant, D. P. Holland. Subsequent to the appointment of Greeley Receiver, by the Circuit Court of Duval county, and in May, A. D. 1873, Holland sold the equity of redemption and all the interest of the Jacksonville, Pensacola and Mobile Railroad Company, in the line of railway from Lake City to Quincy, and from Tallahassee to St. Marks, under an execution issued upon a judgment before that time obtained by him against this company in the Circuit Court of the United States for the Northern District of Florida.

At this sale he became the purchaser, and credited the amount of his bid on the execution. About this time holders of first mortgage bonds of the Pensacola and Georgia Railroad Company instituted a suit in the Circuit Court for the Second Judicial Circuit of Florida, and F. B. Papy was appointed by that court Receiver of the line of road west of Lake City. In July, 1872, other first mortgage bondholders

filed a bill in the Circuit Court of the United States, Northern District of Florida, against the Jacksonville, Pensacola and Mobile Railroad Company and the trustees. In this suit in December, A. D. 1872, the Jacksonville, Pensacola and Mobile Railroad Company, withdrawing its answer, and the suit being dismissed as to the trustees, a decree *pro confesso* was taken against the Jacksonville, Pensacola and Mobile Railroad Company. Papy, under an agreement between the parties, was then dismissed as Receiver.

On the 19th of December, the marshal levied his decree on property west of Lake City, and advertised it for sale on the 7th of July, A. D. 1873. The sale was postponed to January 1, A. D. 1874. After the sale to Holland, and this postponement, Holland remained in possession. The State of Florida, in its own right, and in right of the trustees, filed an original bill in the Supreme Court of the United States, setting up the exchange of securities between it and the railroad companies, alleging that there was a balance of purchase money due the trustees under the original sale, as well as a large amount of interest due the State on the bonds of the Jacksonville, Pensacola and Mobile Railroad Company, stating the before-mentioned proceedings in the courts of the State and the United States in Florida, and praying *inter alia* for injunctions against the marshal, the plaintiffs in the suits in the United States Courts, and for an order to deliver possession to Receiver Greeley, or, in lieu thereof, that the Supreme Court of the United States appoint a Receiver for all the property *west of Lake City*. Upon motion for the appointment of a Receiver after notice, the Supreme Court directed Holland to report his future and past receipts from the road in his possession. With Holland thus in possession, the Circuit Court of Duval county, in this case, ordered him to surrender this possession to Receiver Greeley, enjoined him from any further intermeddling with the possession, and under a writ directed to all and singular the sheriffs of the State, he was dispossessed,

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and Greeley was put in actual possession of the road west of Lake City. Holland now seeks a reversal of these orders, one of the grounds being, that there is no jurisdiction in the Circuit Court of Duval county thus to take into its custody property beyond the territorial limits of the circuit.

This is a question of great importance, and in view of the conflict of jurisdiction between the second and fourth judicial circuits in this case, it should be settled. Under the constitution, this State is divided into seven judicial districts, and "the Circuit Courts in the several judicial circuits" are invested with general original jurisdiction in law and equity. There is no legislation which authorizes the appointment of a receiver of property which is beyond the territorial limits of the circuits. Under these circumstances we can reach no other conclusion than that no such appointment can be made effectively; and that the Circuit Court, in all of its orders in this case, appointing a receiver of property beyond its limits, went beyond its authority. In the language of Mr. Justice Story, in *Picquet vs. Swann*, 5 Mason, 40—"This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a Kingdom, a State, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra territorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit short of his general authority." It is a general principle of the common law that no writ or process can run or be executed beyond the territorial jurisdiction of the court out of which it issues; and independent of legislation, there can be no doubt that the Circuit Court of one circuit cannot through its receiver take possession of property in another circuit. There is no such legislation in this State, and we doubt very much whether such legislation would not be in conflict with the

constitution, but that question is not here involved. In *Galpin vs. Payne*, 18 How., 367, the Supreme Court of the United States uses this language: "The authority of every judicial tribunal and the obligation to obey it, says Burge, in his Commentaries, are circumscribed by the limits of the territory in which it is established." Under the Constitution of Arkansas, in A. D. 1839, the Circuit Court organization was similar to that existing under the present Constitution of Florida. The Supreme Court of that State, (2 Ark., 503,) speaking of this organization, says: "The constitution has distributed the State into a given number of separate and independent circuits, has required a judge to be elected for each of these circuits, whose power and authority is restricted and limited to the prescribed and ascertained boundaries of his particular district. The constitution has furthermore established a Circuit Court in each county of the State, and it has fixed and confined its territorial jurisdiction within the boundaries thereof. No writ or process, according to the common law, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues; and it is clear that the court of one county cannot run its writs or process within the boundaries or limits of another county without some legislation on the subject. What class of cases and for what purposes the Legislature may authorize the Circuit Court of one county to run its writs and have the same executed within the boundaries or limits of another, is a question of some nicety." (4 Mon., 437-8; 2 B. Mon., 203; 4 J. J. Mar., 407-8-9; 1 Dana, 109; 2 Bibb, 445; 1 ib., 410; 1 Ind., 1; 1 Scam., 404.) We do not question the power of a court of equity to require a defendant, within its jurisdiction, to perform any act or do anything in reference to property in another jurisdiction or foreign State. We simply say that a Circuit Court in the State of Florida, under our constitution and laws, cannot by its officer take possession of property beyond its territorial jurisdiction.

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We leave this subject with these general remarks. The appointment of a receiver, with directions to take possession of and manage a line of railway—in other words a manager, is an extraordinary exercise of power. In the case of *Gardner vs. The London, Chatham and Dover Railway Company*, (2 Law Reports, Ch. Appeals, 201,) Lord Cairns says that a court of chancery will not appoint a manager of a railway company. This he puts upon the ground that the company is in the exercise of powers and the discharge of duties and responsibilities confided exclusively to the persons composing the company, and the court should not by its action, without any parliamentary authority, make itself and its officers the hand to execute these powers and public duties. This rule has been modified in the United States. (18 Grattan, 828; 99 Mass., 395; 38 Ver., 408; 6 C. E. Green, 298.) Under the statutes of many of the States (this State among the number,) a receiver of a line of railway is under some circumstances authorized. As a general rule, we do not hesitate to say that a very strong case should be presented before a court should resort to a remedy so extreme, and with reference to the management of the road, so revolutionary in its character. We can hardly imagine a case where it should be done without notice. The road is local, and cannot be taken beyond the jurisdiction and control of the court, and in many cases an injunction or restraining order will accomplish all that is necessary to protect the rights of plaintiffs.

This cause coming on to be heard upon the three separate appeals, taken at different stages of the cause, the defendant the Florida Central Railroad Company, being the appellant in the first appeal, and the said Florida Central Railroad Company, Edward M. L'Engle, Daniel P. Holland, and James Hunter, being appellants in the second appeal, and said Edward M. L'Engle, Francis B. Papy, George R. Foster, Francis F. L'Engle, and Theodore Hartridge, being appellants in the third appeal, said appellants being defend-

ants at the time of taking their appeals, and the questions involved in said appeals having been argued and submitted together by the counsel for the different appellants and the respondents, and the court being advised of its opinion in the premises, and wishing to dispose of all the questions raised by said appeals, it is therefore ordered, considered, and adjudged by the court that the judgment of the Circuit Court of Duval county, rendered in this case on the second day of April, A. D. eighteen hundred and seventy-four, and the order of the thirteenth day of April, A. D. eighteen hundred and seventy-four, be and the same are reversed and set aside and vacated, and that all and every order made in said cause, appointing or continuing a receiver in this cause, and all orders consequent upon the same, and all orders restraining the appellants or any of them, or granting or continuing any injunction against the appellants or any of them, except in so far as any of said appellants are restrained or enjoined from disposing of stock in the alleged Florida Central Railroad Company, be and the same are reversed, set aside, and vacated. And it is further considered that the case, including the three appeals, be remanded to the Circuit Court of Duval county, there to stand for hearing upon the issues made, or to be made by the pleadings, or for such other disposition as is conformable to law, and not inconsistent with the opinion filed in these appeals.

BRYSON dissenting:

I am unable to agree with that part of the opinion in this case, "that the Circuit Court, as a court of equity, has no jurisdiction beyond the territorial limits of its circuit," and as it is remarked by Justice Westcott in the opinion, "this is a question of great importance," I will state my reasons in as brief a manner as possible. The case in 18 Wallace, 350, relied upon by the appellant in this case, has reference to the jurisdiction of a court of law, and a judgment of a court of law, and it is only necessary to refer to the case of

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Picquet vs. Swann, 5 Mason, 40, to show that it had reference to a court of law, where Mr. Story uses this language: "Even the Court of King's Bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland or the Colonies." This is certainly true, and it is equally as true that the Court of King's Bench is a court of common law, and never had any equity or chancery jurisdiction. The same remark will apply to the jurisdiction of county courts in this State. They are courts of limited jurisdiction, and have no equity or chancery jurisdiction or power whatever, and are confined to the county. But it cannot be denied that the courts of equity, both in England and America, have exercised jurisdiction outside of their territorial limits for a considerable length of time; in fact we find them exercising this jurisdiction almost from their creation. In 2 Daniel's Chancery practice, "It is not necessary in order to authorize the court to make an order for a Receiver that the property in respect to which he is to be appointed should be in England. A Receiver will be appointed here of property in the East Indies, in which case the Receiver must find sureties who are residents in England." 2 S. and S., 453. "A Receiver may also be appointed of estates in Ireland, but it seems that in such cases the recognizance of the record and his securities entered into and enrolled in that country." 2 Daniel's Ch. practice, 1425. "It may also be mentioned that officers, in the nature of Receivers, are frequently appointed of plantations in the West Indies, but as a plantation in the West Indies partakes in some measure of the nature of a manufactory or trade, instead of a Receiver, the person appointed is usually called a manager." 2 Daniels, 1424.

Kerr on Receivers at page 259: "When the suit relates to property abroad, or in the colonies which partakes of the nature of a trade, it is competent for the court to appoint a manager." Referring to L. R., 2 Ch., and pp. 212, 213, "the

manager is appointed in such cases, not for the purpose of trading on the trade, but to enable the court to give relief in the cause shall be heard, referring to *Waters vs. Taylor*, 15 Ves., 25 per Lord Eldon; *Shepherd vs. Oxenford*, 1 and J., 500." "Persons, for instance, have been appointed to manage landed property, to receive the rents and profits, and convert, get in and remit the proceeds of property and assets, when such property has been situated in India, the West Indies, Demarara and the Brazils." *Kerr Rec.*, 260. "In conclusion," says Mr. Daniel, 2 Vol., E., 9, "it may be mentioned that the term manager or consignee, as distinguished from receiver, is sometimes used in respect to certain descriptions of property, as mines, estates, or West India estates. There does not seem to be any substantial difference in the practice with respect to officers thus designated, and by the interpretation clause in the order of the 16th of October, 1852, the word Receiver includes consignee and manager. It does not appear that this distinction has been made in this country, but that the order designates the duties of that officer. Then it clearly appears that in England a Receiver may be appointed to property outside the jurisdiction of the court. In this country it will be seen that the practice is not so uniform, it will be seen that the principle is recognized by most of the States. It will appear by reference to the case of *Clarke vs. Clarke*, 17 How., 322, the Supreme Court of the United States holds, that a Receiver appointed in the First Circuit of the State of New York could sue for and receive property outside of the State. The court in that case uses language on page 536, condensed reports: "No attempt was made, according to the chancery practice, to cause Clarke, by the attachment of his person under the injunction, to make an assignment of that claim for the payment of Samara's judgment." "It cannot be said that Clarke had property to assign, and that it was, therefore, unnecessary to attach him. That would make no difference, for

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whether with or without property he might have been compelled to make a general assignment, even though he had sworn that he had none." It was so ruled in *Chipman vs. Sabbatton*, 7 Paige C. R., 47, and in *Fitsburgh vs. Everingham*, 6 Paige, 29." "There was a want of vigilance in this matter which does not make any equity which he may have in New York upon Clark's property superior to that of Clark's creditors, who are pursuing the funds in this district;" clearly showing that if the proper proceedings had been had the Receiver might have maintained his action, for the effects claimed in that suit, outside of the State of New York, not merely outside the jurisdiction of the territorial limits of the First Judicial Circuit. "When the appointment of a Receiver has been perfected by filing of the report and security, the title to the personal property, covered by the Receivership, vests in the Receiver without any assignment or transfer from the person in possession." 9 New York R., 142. "But that is not so with the real property. That passes by force of the debtor's own conveyance which the court has power to compel him to execute." 10 New York R., 369; *Thompson on Provisional Remedies* 480. It was held in *Mitchell vs. Bunch*, 2 Paige R., 615, that a Receiver might be appointed over property outside of the jurisdiction of the court. That, "although the property of the defendant is beyond the territorial reach of the court, so that it can neither be sequestrated, nor taken in execution, the court does not lose its jurisdiction to that property, provided the person of the defendant is within the jurisdiction." "By the ordinary proceedings, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court, or execute such a conveyance or transfer thereof as will be sufficient to vest the legal title as well as the possession of the property, according to the *lex loci rei sitae*;" the identical mode indicated by the Supreme Court of the United States

in 17 How., 332. It will be seen that the same principles are laid down in Daniels Ch. Practice, 2 Vol., 1045, 1046, and the same doctrine is more fully set forth in Story's Equity Jurisprudence, 743-4. "The proposition may, therefore, be laid down in the most general form, that to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is not necessary that the land should be situated within the jurisdiction of the State or country where the suit is brought," says Mr. Story, and with all his ingenuity and talent for research, he was ruling had been made, and both of these were governed by only able to find two cases in this country where a contrary peculiar circumstances surrounding them. "The case in Pennsylvania it was decided that the court had no jurisdiction over a bill praying for an injunction against the defendant residing in another county, but who was temporarily within the jurisdiction of the court, for erecting a nuisance which injured the plaintiffs' land in that county; for to give complete remedy in such a case, a court must not only restrain and prevent a continuance of the nuisance, but must order its removal and give compensation in damages for the injury already caused, and for a court of equity to give this ample relief, the *locus in quo* must be within the absolute jurisdiction of the court." 1 Parson's Eq. R., 387. The case in North Carolina referred to—it appears that one of the joint executors resided in the State of Tennessee, and that the lands and those having the legal title to the same were in Tennessee, and only one of the executors before the court. It was fully admitted by defendants' counsel and held by the court, that where either the person or the subject matter of the suit was within the jurisdiction of the court, that the court had jurisdiction of the whole.

It appears from the pleadings that this suit was commenced under the Code, and that the statute repealing the Code uses this language: "Section 11. That all suits already commenced, and all pleadings already in, shall not be affected

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by any of the provisions of this act, but shall be proceeded in as if the act had not passed." Act 1872, p. 18. It appears from the act that the jurisdiction of the court is not diminished. See Sec. 192. A Receiver may be appointed, first, before judgment, on the application of either party, when he establishes an apparent right to the property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure may be had without application to the court.

Mr. Thompson, in his work on Provisional Remedies after copying the section, of which our Code is an exact copy, says: "This section bears upon its face unmistakable evidence of a determination by the Legislature in its enactment between actions at law and suits in equity. The first and second branches of the section plainly apply to the latter class of actions exclusively, while the third is clearly intended to apply to actions at law, and is, therefore, an obvious enlargement of the power of the court to enjoin. The first two clauses are, in substance, a mere embodiment of the established equity principles as they existed before the Code, and cannot be construed to create new rights of action or give new remedies; nor are they, in any sense, an abridgement of the former jurisdiction of the court." "The provisional injunction allowed by this section may be granted in every case where a temporary injunction would have been proper under the former practice." Thompson on Provisional Remedies, p. 204, § 2. And he refers to the case of Rawlins against Joel, 13 N. Y., 488. Again the same author says, "that every kind of property of such a nature that if, if legal, it might be taken in execution, may be, if equitable, put into the possession of a Receiver; and here the appointment of a person has been said to be an equitable execution," (page 483,) and referring to Edwards on Receivers in Equity, under the former practice, p. 6. "If the property

is in the possession of a third person, claiming a right to retain it, the Receiver can proceed by suit against such person in the ordinary way, and thus try the right, or the plaintiff may amend his complaint, making such third person a party, and the receivership extended to the property in his hands, so that the order for the delivery of the property may be binding upon him, and be enforced, if necessary, by process of contempt." Thompson on Provisional Remedies, 483, referring to 8 Paige's Reports, 390. Then it clearly appears that the powers of the court under the Code have not been abridged or made less. It appears from the pleadings in this suit that it is brought by the State of Florida and the Trustees of the Internal Improvement Fund against the Jacksonville, Pensacola and Mobile Railroad Company, a corporation created by the laws of Florida, authorizing it to construct a line of railway from Quincy, west, to the Alabama line, with the privilege of extending it to Mobile, Alabama. The act also authorizes said company to consolidate with any road, or part of road, completed from Quincy to Jacksonville, and to operate the whole line of railway from Jacksonville to Quincy, by consolidation or otherwise. The act, as amended, authorizes the Governor of the State to deliver to the President of the Jacksonville, Pensacola and Mobile Railroad Company the bonds of the State for all the road completed and in good running order, in exchange for the like amount of bonds of the Jacksonville, Pensacola and Mobile Railroad Company, which bonds are to be a statutory lien upon the road and all its property. That the bonds of the State had been issued and delivered to the President of the Jacksonville, Pensacola and Mobile Railroad Company to the amount of four million dollars, and as the same amount of bonds had been issued by said company and delivered to the State by the President of said company, but that one million of dollars of the bonds so issued by the State were payable to the Florida Central Railroad Company, and the same amount of bonds delivered to the State

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by the President of the Jacksonville, Pensacola and Mobile Railroad Company, were issued by and under the seal of the Florida Central Railroad Company; that the Florida Central Railroad formed part of the line of railway from Jacksonville to Quincy; that the whole line of road from Jacksonville to Chattahoochee was in possession of the Jacksonville, Pensacola and Mobile Railroad Company; that its principal office was in Jacksonville; that all the business of the corporation was transacted at that office; that at the commencement of this suit, Chase, Ambler and Flagg were operating the whole line under a lease from the Jacksonville, Pensacola and Mobile Railroad Company. It appears that this line of railway in operation extends entirely through the second and third circuits, and that about forty-nine miles of the railway, and the principal office, are within the fourth circuit, and all within the State of Florida; that the process had been served upon the President of the Jacksonville, Pensacola and Mobile Railroad Company in the fourth circuit. Then, applying the principles of equity jurisdiction, and the jurisdiction under the Code, heretofore referred to, and the more clear and pointed doctrine declared by the Supreme Court of the United States in 9 How., 390, a court of equity having obtained jurisdiction for one purpose, will proceed to grant full relief. "If the court of equity has jurisdiction of part of the subject matter and the defendant, it may direct a public sale of lands lying out of its territorial jurisdiction, and compel the party to convey." *Lyman vs. Lyman*, 2 Penn., 11; *King vs. Tuscumbia, Courtland and Decatur Railroad Company*, 7 L. I., 166. These two last authorities are from the State which Mr. Story relies on. Though equity cannot act directly on the land not within its jurisdiction, it may compel the holder of the title who is a party before the court to give effect to a lien. *Lewis vs. Darling*, 16 How., 1. Applying these well settled rules, I am compelled to hold that in this case, if a proper case had been made, and the proper proceedings had, that the court

did have jurisdiction of the whole line of road, and did have authority to make any order that was necessary to protect the whole property until the rights of the parties could be determined. The property of the defendant may be sold in any county in the State under an execution issued upon a decree of the court, and it cannot be that a court of equity has not the power to protect any property which may be finally disposed of by it. If a court of equity has not the authority when it has possession of part of the subject matter, and the defendant is before it, to reach any property within the State, then that long arm, which is dwelt on so much by writers on Equity Jurisprudence, and so often used by courts of equity to prevent fraud and injury, has become very short in Florida. Suppose this suit was alone against the Florida Central Railroad Company, when forty-nine miles of that road lie within the territorial limits of the fourth circuit, and only eleven in the third, can it be possible that that court would not have jurisdiction to protect the whole of the property in litigation until the rights of the parties are determined? As the order appointing a Receiver, directing Greeley to take possession, and displacing Holland, was made without notice, and after the plaintiff had filed a bill in another court, making Holland a party, and asking for a Receiver, and that court having continued Holland in possession and amenable to that court, it is certainly without precedent, and for these reasons, the order must be reversed.

The appointing a receiver to run a railroad is certainly a modern invention, and there is certainly nothing in the proceedings in this case that authorizes any such an appointment under any precedent which can be found.

I fully concur with all the other rulings of the court.



DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, 1875.

BERTY BILLINGS, APPELLANT, VS. GUSTAVE STARK, RESPONDENT.

A certificate of the Clerk of the United States Direct Tax Commissioners is not evidence of a sale by them for taxes.

By the act of Congress of June 7, 1862, for the collection of direct taxes in insurrectionary districts, "the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid . . . shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever." Under this provision, where the plaintiff shows title under a certificate of sale by the tax commissioners, the evidence of the defendant's good title anterior to the tax assessment and sale, or of a title by deed from the former owner, is not a defence.

Either party is entitled to the benefit of any evidence introduced upon the trial by the other party.

The neglect or refusal of one of three forming a board of United States Tax Commissioners to act, or his dissent from the proceedings of the majority, will not invalidate the act of the majority; and a tax sale certificate signed by two of the commissioners is "*prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser;" and this having been held by the Supreme Court of the United States, construing an act of Congress, is conclusive upon the State courts.

There is no power vested by law in the officers of the Treasury Department to set aside a sale, or vacate a title acquired by a purchaser at a sale, for direct taxes; and the assent of the purchaser to the setting aside of the sale, after he had conveyed the premises to a third person, cannot affect the rights of such third person, unless he also assented.

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6. A deed in the possession of the grantee is presumed to have been duly delivered at the time it bears date.
7. The court charged the jury that, if they find, from the evidence, that the plaintiff (the grantee of a purchaser at a tax sale) did not put his deed on record until after the purchase by the defendant from one who owned the property before the tax sale, and that the defendant had no notice of the plaintiff's title, and who purchased for a valuable consideration, the plaintiff's title would not prevail. *Held*, that this instruction was erroneous. The act in regard to recording conveyances in this regard relates to conveyances by the same grantor or his grantees, and was designed to protect subsequent purchasers and creditors, and has no reference to a title acquired from other sources.

Appeal from judgment of Circuit Court for Nassau county.

The appellant sued the respondent in ejectment to recover a lot of land in Fernandina.

The defendant answered, denying the allegations in the complaint, and, for a further defence, alleged that he had the peaceable possession of the premises, under title adverse to the plaintiff, for seven years preceding the commencement of this suit.

Upon trial, plaintiff proved that the defendant was in possession of the premises at the time of the commencement of suit; produced a deed of bargain, sale, and quitclaim, executed by C. L. Robinson, conveying the lot to plaintiff, dated 20th July, 1863, duly sealed and witnessed, and proved for record 28th May, 1872, and recorded October 25, 1873.

Plaintiff also offered in evidence a certificate of the Clerk of the Board of United States Direct Tax Commissioners for Florida, dated July 20, 1863, stating that the lot in question had been sold to C. L. Robinson, for taxes, by the United States Tax Commissioners for direct taxes, in June 1863. Defendant objected to the reading of this certificate in evidence. The record shows that the court refused to receive it as evidence. The plaintiff excepted to the ruling.

The plaintiff having rested, the defendant offered in ev

dence certain conveyances of the lot in question, viz.: A deed of trust from the Florida Railroad Company to Soultter & McRae; a power of attorney from Soultter & McRae to George W. Call, authorizing him to sell and convey the land; a deed by G. W. Call, attorney, dated in 1860, to F. A. and J. J. Acosta; and a deed, by the latter, to Mary B. Stark, wife of defendant, dated January 17, 1867, all duly recorded—which were objected to by the plaintiff and admitted by the court, to which plaintiff excepted. Defendant then proved possession, by his grantors and himself and wife, from 1856 to the present time.

The defendant then further offered in evidence a certified transcript, from the Treasury Department of the United States, of proceedings of the Board of United States Tax Commissioners for Florida, in relation to the sale of the lot, and other papers, viz.: 1. A copy of the certificate of sale by the United States Tax Commissioners (signed by two of the commissioners, Sammis and Reed), for direct taxes, dated 22d June, 1863, stating that the lot had been sold by them to C. L. Robinson; 2. A paper, dated September 3, 1863, purporting to be an opinion of the Commissioner of Internal Revenue, that the sale by Sammis and Reed, without the concurrence of the other commissioner, was void, and that the property ought to be re-advertised for sale; 3. A new notice of sale, signed by Stickney and Alsop, two of the then commissioners, for a sale to be made in November, 1864; 4. A certificate of sale of the lot, for direct taxes, December 28, 1864, to Leah Mooney, signed by three commissioners; 5. A certificate that T. N. Acosta had redeemed the lot from sale, April 10, 1865, signed by three commissioners, Stickney, Smith and Alsop; and, 6. John H. Mooney's receipt for the redemption money.

A further transcript from the Treasury Department was offered to show that Stickney, of the tax commissioners, was not in Florida, and had not concurred in making the appraisal and sale of lots in 1863, and that he dissented

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from and disapproved of the acts of Sammis and Reed, and to show that the tax certificate under which plaintiff claims had been surrendered by Robinson and cancelled, and the purchase money returned to him after the decision of the commissioner at Washington that the sale was void.

The plaintiff was called as a witness for the defendant, and testified that he came to Florida in the spring of 1863, where he met Stickney and Robinson, who both urged him to purchase at the sale to come off in June; that he received the deed from Robinson, who sent it to him at Beaufort; accepted the deed; got back from Robinson about \$190 of money left in his hands, but had not recovered any part of the consideration paid him for the lots described in the deed.

C. L. Robinson testified, in behalf of defendant, that his impression was that he gave plaintiff a quit-claim deed. Plaintiff was at Fernandina before the sale took place in June. Stickney, one of the commissioners, was a business partner of witness. Witness afterwards learned that the government had repudiated the sale, and he surrendered the certificate to the commissioners in the fall or winter, and took back the purchase money. At the second sale he bought again, but not for Billings. Billings had left money with him to buy lots in Fernandina. After the sale witness informed Billings that he had purchased extensively, and if he wanted any lots, to come and select them. Billings wrote him to make the selection himself, and send him a deed. Made a quit-claim deed for several lots, including the lot in question, and left it in his store with a partner; did not send it to Billings.

Under the charge of the court, the jury retired and returned a verdict for defendant.

Billings for Appellant.



Friend & Hammond for Respondent.

RANDALL, C. J., delivered the opinion of the court:

Had the defendant rested upon the plaintiff's showing, the verdict could not have been disturbed. The certificate of the Clerk of the Board of Tax Commissioners is not made evidence of the sale of lands for taxes. The act of Congress makes the certificate of the commissioners evidence of the sale. When the defendant introduced a certified copy of the tax certificate, of the date of June, 1863, he had supplied the necessary link in the plaintiff's testimony by which his case was *prima facie* made out. The defendant's counsel insists that the plaintiff is not entitled to the benefit of the certificate of sale, introduced by the defendant in connection with other papers, but the rule is otherwise. If the whole record contain evidence sufficient to make the plaintiff's case, he is entitled to it, though introduced by the defendant, even as the defendant is entitled to use any evidence produced by the plaintiff. The case stands upon the whole evidence before the court.

The certificate of the tax sale to Robinson, signed by the direct tax commissioners, and the deed from Robinson to Billings, made a case upon which the plaintiff was entitled to recover, unless this title was overthrown by the evidence on the part of the defendant.

The defendant, in order to defeat the plaintiff's right of recovery, introduced his evidence of title from the Florida Railroad Company, in 1856, down to the deed of the Acostas, in 1867, to the wife of the defendant.

It was objected to the deed executed by George W. Call, as attorney of Soultter and McRae, trustees, that the deed was of no effect because the trustees had no authority to act by attorney, there being no express powers to appoint an attorney-in-fact in the deed of trust; and this is a prominent point made in the assignment of errors. In view of the whole sale, however, we will not dissect the deed of trust at this time to ascertain the scope of the authority of the trustees, for it makes no difference in the result. The

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defendant is in possession, and the plaintiff's right depends upon the tax sale, while the defendant's rights, as against the plaintiff, do not depend upon the validity of his former title.

And so the evidence of title offered on the part of the defendant was superfluous and irrelevant to his defence.

The fourth section of the act of Congress of June 7, 1862, "for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," reads as follows: "That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid, as above provided, shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided, shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

The sale of the property in controversy was made by the tax commissioners because of the non-payment of a tax levied in pursuance of this law. The validity of the act of Congress is not called in question upon the argument as to the whole or any part of its provisions. The sale having been made, and the certificate given as required by law, the purchaser was invested with the title, "free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever;" and, by the seventh section, "the certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale, and of the title of the said purchaser," subject to the right to redeem by the former owner, or others having an interest, within the time prescribed by law.

And we repeat that the plaintiff's case, resting upon the tax sale and the deed from the purchaser, is not met by the evidence of a former title. The defendant must defeat the plaintiff's case by showing that the assessment and sale were not made in conformity to law, "that the property was not subject to taxes, or that the taxes had been paid previous to

sale, or that the property had been redeemed according to the provisions of this act." (See last paragraph of Section 7.)

A certificate of sale, signed by two of the tax commissioners instead of three, is held by the Supreme Court of the United States to be valid, as though it had been signed by the three. (12 Wallace, 398.) This decision is conclusive upon this court.

The testimony as to the non-concurrence of the third commissioner in the assessment, notice, and sale, as given in the record, does not invalidate the proceedings. The neglect or refusal of one of the members of the Board to act, or his disapproval of the acts of the majority of the board, cannot affect the validity of the acts of the majority. Any other rule would make the legality of their proceedings entirely dependent upon the caprice or contumacy of the minority.

The respondent insists that the sale in June, 1863, and the certificate, were annulled and set aside by the Treasury Department at Washington, and that therefore the certificate and the sale became null.

The transcript of the proceedings of the Treasury Department does not show that any order was made setting aside that sale. The opinion of the Commissioner of Internal Revenue that the sale was irregular and void by reason of certain facts stated to him by the dissenting tax commissioner, is merely an opinion, and is not sustained by the Supreme Court in the case above cited; and, indeed, if the purchaser at that sale had any rights of property under it, we are not aware of any power in the Treasury Department competent to divest him or his grantee of such rights.

Upon the pronouncing of that opinion by the Internal Revenue Commissioner, it appears that the tax commissioners again advertised and sold the same property for the tax that another person purchased at the last sale, and that the property was redeemed from this sale.

Whether Robinson, the purchaser at the sale in June,

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1863, on learning that the government "repudiated" that sale, surrendering the certificate of sale and receiving back the money from the commissioners, and becoming a purchaser at the second sale, may thereby be estopped in law, or in equity, from setting up any title in himself under that certificate, is not a question here. He had conveyed to Billings before he surrendered the certificate, according to the evidence, and his surrender of the certificate could not affect the title of Billings, if he had any title. It appears that there were included in the same certificate a large number of lots purchased at the same sale; and if all the lots so included were not conveyed by Robinson to Billings, this may account for the retention of the certificate by Robinson, instead of passing it over to Billings, and his subsequent surrender of it to the commissioners. The proceedings had, as shown, and the subsequent sale, do not affect the vested rights of the parties in interest, unless they assented to the proceedings, of which there is no evidence.

The counsel for respondent refers to an authority to show the effect of the surrender of a patent. On referring to the case (found in 1 Black, U. S.,) it is found that it treats of a patent issued under the laws regulating patent rights, and not to a title to lands.

The respondent insists, in his argument, that there is no evidence that the plaintiff acquired any rights prior to the surrender of the certificate. We do not understand that the respondent intends to impeach the integrity of his witness, Robinson, by insisting that Robinson, for a consideration, conveyed to Billings *after* he had surrendered this certificate and received the money for it. On the contrary, the testimony of Robinson and Billings both shows that Billings had left with Robinson money to be invested in the sales to take place in June, 1863; that it was so used; that Stickney, the third and dissenting commissioner, had urged Billings to purchase at this sale; that, within thirty days after it, Robinson executed his deed to Billings of the

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lot in question, with other lots, which deed was left by Robinson in a store with a partner; and that Billings received the deed at Beaufort. Robinson states that Billings wrote to him to select the lots and send him the deed; that his impression was that he gave to plaintiff a mere quit-claim deed; that he "did not send it," but "left it in the store;" but he does not say that it was not sent or delivered to Billings with his consent or by his directions; nor is there any evidence that Billings ever knew of Robinson's surrender of the certificate; but it does appear that Robinson did not return to Billings the money consideration for the deed of this lot. That Robinson acted as the agent of Billings, in purchasing the lot, seems quite clear. A deed in the possession of the grantee, purporting to have been executed and delivered at a given date, is presumed to have been duly delivered to the grantee at the time named.

So far as the evidence in this record goes to the point, the proof of the execution and delivery of the deed at about the time of its date; that the lots were purchased for Billings, with his money, by Robinson, and conveyed for that reason to Billings, are *prima facie* established. (We comment upon this matter only because the point was argued before this court.)

The charge of the court, as contained in the record, is entirely sustained by what we have already said, except as to a single point. The court charged that "if the jury find, from the evidence, that plaintiff did not record his title in the records of Nassau county until after the purchase of the property by Mrs. G. Stark, and believe, from the evidence, that she had no notice of the title of the plaintiff, the conveyance of C. L. Robinson to the plaintiff would not be good or effectual, as against her, if she purchased for a valuable consideration."

This is the only portion of the charge excepted to by the plaintiff. The recording acts provide that no conveyance of real property shall be good in law, or in equity, against

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litors or subsequent purchasers for a valuable consideration, and without notice, unless the same be recorded in the office assigned by law for that purpose. The court misapprehended the purpose of the act in applying it to this case. The object of the law was to prevent fraud by parties concealing the fact of a conveyance and making a subsequent conveyance to a *bona fide* purchaser without notice. Had the deed of the plaintiff proceeded from the same grantor who subsequently conveyed to Mrs. Stark, the prior deed not being recorded, the statute would apply. But the plaintiff derives his title, if he has any, from the government through its power to collect revenue. No conveyance can be made by a former owner which will relieve property from the payment of taxes, or defeat a title lawfully acquired from the government through forfeiture and sale for taxes. The recording acts were not intended to promote, but to prevent fraud.

It is evident that the jury were misled by this instruction.

The judgment must be reversed, and a new trial granted.

EDWARD J. LUTTERLOH, APPELLANT, VS. THE MAYOR AND COUNCIL OF THE TOWN OF CEDAR KEYS, RESPONDENTS.

1. The erection of a building in the centre of a street sixty feet wide, to be used for a market for meat, fish, &c., and as a pound for confining swine and other animals and as a jail, in front of places of business or private residence, would be both a public and private nuisance, and the courts of equity will interfere to prevent or abate it in behalf of any one likely to sustain an injury thereby.
2. The corporate authorities of a town have no right to appropriate the public streets to any other uses than that of travel, or right of way to which they were dedicated, and the convenience of the whole people.

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lic, and they cannot lawfully obstruct the streets with public or private buildings; and any person whose property is especially injured thereby, may have the aid of the courts of equity to restrain such improper appropriation.

Appeal from the Circuit Court for Levy county, Fifth
Judicial Circuit.

A statement of the case appears in the opinion of the
Court.

Thomas F. King, and Papy & Raney, for Appellant.

— *Jackson for Appellees.*

RANDALL, C. J., delivered the opinion of the court.

Plaintiff filed his complaint for an injunction against the corporate authorities of the town of Cedar Keys to restrain them from erecting a market-house, public pound and jail, in the centre of a street sixty feet wide, in the immediate front of a building of the plaintiff, occupied as stores and sleeping apartments, and suitable for a dwelling house—the proposed edifice to be twenty by thirty feet. The market place is designed to be used for the sale of meat, vegetables, fish, &c.; the pound for the shutting up of hogs and other animals, and the jail for the confinement of disorderly people and criminals. The complaint alleges that on account of the location, and the character of the purposes designed in the erection of the house, it will be a nuisance, and will seriously and injuriously affect the value of his property and render access to it from one direction inconvenient, and that it will obstruct travel.

After service of process and notice of an application for an injunction, the judge refused the injunction. There was no answer or counter affidavit.

The plaintiff appeals from this refusal. There can be no question that the facts stated in the complaint show an intention on the part of the corporate authorities to erect a public as well as a private nuisance.

In addition to the alleged offensiveness of such an institution immediately in front and so near the habitations of families and places of business, the obstruction of the public street in this manner is unwarranted. The corporation of the town has no more right to erect such an obstruction in the highway than has any private citizen. The right of occupancy of the street by the public is a mere easement or right of passage. The rights of owners of adjacent lots fronting on the street are greater than this; they have also a private right and interest. The purchasers of town lots have generally located their houses and invested their money with reference to the streets, and their property is necessarily affected by the permanent closing or partial closing of these avenues; and upon various considerations, if specially injury be threatened, they may demand that their property be protected against injury by such permanent obstruction and nuisances. The reported cases show no instance in which, upon such circumstances as are here stated, the courts of equity have failed to protect private rights by an injunction or other necessary process to prevent or abate the nuisance.

The order of the judge is reversed, and this cause remanded with directions that an injunction be allowed. The appellant will recover costs of the appeal and proceedings in this court.

JOSEPH M. MICHEL, APPELLANT, VS. JOHN S. SAMMIS, APPELLEE.

An original bill, filed for the purpose of enjoining the execution of a decree of foreclosure of a mortgage upon the ground that a defense existed of which the defendant neglected to avail himself, or which may have been denied by the court, cannot be sustained.

Appeal from Duval Circuit Court, Fourth Judicial Circuit.

The opinion of the court contains a statement of the case.

Ives & Dawkins for Appellant.

The principal questions to be determined in this case are:

1. What constitutes a homestead?
2. Whether a mortgage given for any purpose other than those embraced within the exceptions mentioned in the constitutional exemptions constitutes a valid lien upon a homestead?
3. What is necessary to be done by a party to be entitled to the benefit of a homestead?
4. Can a homestead, exempted from forced sale by the Constitution of this State, be sold under a decree of foreclosure, except for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon, or for labor performed on the same?
5. Do the homestead exemptions in this State impair the obligation of contracts?

Mr. Bouvier defines the homestead to be the place of the house, or home place. (Bou. L. Dic. Vol. 1, p. 670.)

A homestead is a house used as a home, together with the prescribed quantity of land on which the house is situated. The word *home* is to have its ordinary and usual signification. * * Homestead means the home place. (Richardson, C. J., in 7 N. H. 245; Ib. 483.)

The homestead is the dwelling place of the family, where they permanently reside. (Cook vs. McChristian, 4 Cal., 26.)

It may be laid down as a general rule that the premises do not become impressed with the legal character of a homestead until actual residence and occupation by the family as a home. (Holden vs. Phinney, 6 Cal., 236, 625; Norris vs. Moulton, 34 N. H., 392; Meyer vs. Claus, 15 Texas, 516; Wisner vs. Farnham, 2 Mich., 472; Benedict vs. Bunnell, 7 Cal., 245.)

Every State may exempt any property it thinks proper from sale for the payment of a debt, and may impose such

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conditions and restrictions upon the creditor as its judgment and policy may dictate, and all future contracts must be subject to such provisions. (*Bronson vs. Kinsie et al.*, 1 How. 321.)

In *Garret vs. Cheshire*, Mr. Justice Reed, after referring to various decisions of the Supreme Court of the United States, says: "I have already shown, in the quotations from the United States Supreme Court decisions, exemption laws are based upon policy and humanity, and they do not impair, but are paramount to debts." (*Garret vs. Cheshire*, 69 N. C., 396; published also in 12 Amer., 647.)

A lien cannot exist where there is no power of sale. (*Ror* on Judicial Sales, Sec 109, and cases cited.)

Lien is defined to be a hold or claim which one person has upon the property of another as a security for some debt or charge. (2 Bouv. Law Dic., 47.)

Lien carrying with it the power of sale, the only liens which can constitutionally bind the homestead are for taxes due and unpaid; obligations contracted for purchase of said premises, or for the erection of improvements thereon, or for house, field, or other labor performed on the same. (Const. of Fla., Art. 9.)

A homestead cannot be subject to forced sale for the payment of debts. (*Stone vs. Darnell*, 20 Texas, 11.)

A forced sale is one made under the process of the court, and in the mode prescribed by law. (*Sampson & Keene vs. Williamson*, 6 Texas, 102.)

In Texas, where the constitutional provision is somewhat similar to ours, it was held that an ordinary mortgage, properly executed both by the husband and wife, could not be foreclosed in court, or the property sold on judicial process, because such a sale would be a *forced sale*. (*Sampson vs. Williamson*, 6 Texas, 102.)

In no case, and under no circumstances, can the homestead be bound by a mortgage which needs to be enforced by foreclosure. * * * The prohibition of a *forced sale*

is absolute and complete. (Jourdan vs. Park, 38 Texas, 440.)

The distinction seems to be that parties (husband and wife) can only bind homestead by deed of trust, or mortgage with power to sell and convey without foreclosure. *Ib.*

The exemption need not be claimed, and the possession and use of property as a homestead are notice to the officers making a levy that it is held as such. (1 Central Law Journal, 65; Wilkerson vs. Wait, 44 Verm., 508; Wilkerson vs. Wait, 8 Amer., 391.)

The principle is well established by authority that whatever is enough to excite attention, or put a party on inquiry, is notice of everything to which the inquiry might have led. Sufficient information to lead to a fact shall be deemed sufficient to charge a party with knowledge of it. (Ploughboy, 1 Gall, 41; Hinds vs. Vattier, 1 McLain, 128; Wailes vs. Cooper, 24 Miss., 228; Parker vs. Foy & Florer, 43 Miss., 260.)

H. Bisbee, Jr., for Appellee.

The question raised is: Can a man mortgage property which he represents not to be claimed as homestead, and afterwards set up a homestead claim and defeat the mortgage security?

If the affirmative of this proposition can be maintained, it must result from some arbitrary statute law of the State. There is certainly no doubt that the common law favors a free and unrestricted right of alienation of real estate; indeed, a covenant or condition in restraint of alienation is void. It is undoubtedly true that there is no statute of the State prohibiting a man and his wife from conveying, in fee, real estate; and it must necessarily follow that if they can convey the fee, they can mortgage, whether the latter be considered as conveying the fee or as creating a lien.

If they convey in fee, how can it be claimed that the grantors can afterwards claim a homestead in the property; or, if they execute a mortgage upon a particular lot of land.

as in this case, upon what principle can they afterwards assert a homestead right in that particular lot to impair the contract of mortgage?

The Constitution and laws of the State, it is true, provide for a homestead which shall be exempt from *forced sale*; but when he executes a mortgage upon a certain lot of land, the law does not say that he can claim a homestead *in that lot* exempt from a forced sale.

Besides, it is a *part of the mortgage contract*, as fully as if set forth in the mortgage itself, that if the money loaned or secured by the mortgage is not paid, the holder of the mortgage shall enjoy the right of purchasing, and of having a decree for the sale of the premises. This is a part of the contract, and hence not a forced sale, but a sale by consent (Bronson vs. Kinzie et al., 1 How., S. C., 318, 319.)

"Forced Sale."—These words, in the case of Peterson v. F. A. Hornblower, administrator estate of Henry Miller and Catherine Miller, a late case decided by the Supreme Court of California, have been defined: "They are *synonymous* with sale on execution, but mean a sale against the will of the owner, and do not apply where the owner consents directly to the sale, or does so indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale, or a sale under a *power contained* in a mortgage or a decree of foreclosure."

The consent to a sale is in the mortgage contract, according to the authorities cited, and the California case sustained the mortgage *executed after* the declaration of homestead had been made.

If a man can mortgage, and then defeat the mortgage by asserting a homestead, he is simply clothed with power and license to *commit a fraud*, against which no vigilance could guard. If one had ten lots to-day, he could mortgage one, and, before the mortgage matured, sell the other nine and claim the mortgaged premises as a homestead.

No civilized State ought to countenance such a fraud,

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nor permit the consequences of such a law upon the property of the people.

We submit that, in this case, the question is not, *can a man and wife mortgage a homestead?* but, can they execute a good security upon a parcel of land not claimed as a homestead, and then prevent the enforcement of the contract of mortgage by claiming a homestead?

A State cannot make a law impairing the obligation of a contract; yet, if the complainant's claim is sustained, a citizen of Florida can do what the State cannot: he can impair the obligation of a contract of mortgage *by his own act* of applying to a particular parcel of land a law of the State which, when he executed the mortgage, he asserted he did not apply to it. This is simply saying that, in Florida, the law authorizes a man to commit a fraud.

The plea not being replied to, of course all the facts stated in it are admitted by the complainant.

RANDALL, C. J., delivered the opinion of the court.

The complainant Michel filed his bill in the Circuit Court for Duval county, alleging that he is a citizen of this State, the head of a family entitled to hold a homestead. That he owns a lot in the incorporated city of Jacksonville, and occupies it with his family as a homestead, it being less than one-half an acre of land, and that the defendant, through and by the sheriff of Duval county, by virtue of legal process, is about to sell the lot, and has advertised it for sale. That the intended sale is not for taxes or for purchase money or for improvements or for labor on the same, wherefore he prays an injunction to prevent the sale.

A temporary injunction was allowed.

The defendant filed a plea alleging that in June, 1870, he loaned the appellant five hundred dollars, and took his promissory note therefor, secured by a mortgage upon the premises in question, the mortgage being in the usual form, duly executed and recorded. That in May, 1873, he com-

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menced suit in equity to foreclose the mortgage; that Michel and his wife were duly served with the process of the court, and on the 26th day of August, 1874, a final decree of foreclosure and sale was duly entered and signed in the Circuit Court for Duval county, and that by virtue of said decree he was about to sell the property, this being the same matter of which the appellant complains in his bill.

The cause was set down for a hearing upon the bill and plea, and the court refused a permanent injunction and dismissed the bill, whereupon complainant appeals.

The question of the exemption of the mortgaged premises as a homestead under the Constitution and laws of this State, was the only question discussed by counsel for appellant.

We would cheerfully proceed to the decision of that question in this case if it were possible, but the law and the well established principles of judicial action forbid it.

The plea alleges that the mortgaged premises have been condemned to be sold to pay the mortgage debt; that the decree was made by a competent court having jurisdiction of the subject matter and of the parties, and thereby it was determined and adjudged by that court that the property was liable to be sold to pay that debt. This plea is not controverted, and the cause was heard as upon demurrer to the plea.

The question now presented is, whether the bill in this case can be maintained? whether the decree of foreclosure can be examined and reversed, set aside or enjoined upon the grounds alleged?

A bill of review and a bill in the nature of a bill of review, are the only bills which can be brought to affect or alter the decree, unless it has been obtained by fraud. (*Daniel's Ch. Pl. and Pr.*, 4 Am. Ed., 582; 1 Fla., 455; 9 Fla., 325.)

The true office of this sort of bill as now used, is to bring before the court new matter discovered since publication

in the original cause when the decree has not been signed and enrolled. (Story's Eq. Pl., Sec. 422.)

It seems to be a general rule that a supplemental bill for newly discovered matter should be filed as soon after the new matter is discovered as it reasonably may be. If, therefore, the party proceeds to a decree in the original suit after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a bill in the nature of a bill of review founded on these facts, for it was his own laches not to have brought them forward at an earlier stage. *Ib.*, § 423 *et seq.*, and authorities there cited; *Miller vs. Sherry*, 2 Wall, 373; *Haynes vs. Meek*, 14 Iowa, 320.

There being no fraud nor no new matter charged as the ground for relief, this bill is not a bill of review or in the nature of a bill of review, which we have seen are the only known methods of attacking a decree for the purpose of availing the party of matters of defence not already interposed, and which matters of defence must have come to his knowledge or possession since the decree. Obviously the matters alleged in this bill were within the knowledge of the appellant at and before the commencement of the foreclosure suit, and there is no pretense of fraud or over-reaching on the part of the original complainant.

The Supreme Court of Texas, which has gone quite as far in the protection of the homestead from sale under mortgage foreclosure as any other court, if not a little farther, has said in respect to the conclusiveness of a judgment or decree: "It is an elementary principle, which does not require the support of argument or authority, that the judgments of a court of competent jurisdiction are revisable only by an appellate court, and cannot be impeached collaterally. So long as the judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to possess and execute the judgment. (Citing 10 Pet., 449.) It is not necessary to the conclusive-

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ness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. * * * That question, therefore, it was not competent for the defendant to bring again into litigation in this action, unless it had been proposed to impeach that judgment on the ground of fraud, which is not pretended or averred in respect to the judgment." (Lee vs. Kingsbury, 13 Texas R., 68.)

"If the decision was erroneous, the defendant had his remedy by an appeal or writ of error to reverse the judgment. There is nothing in the nature of the right of homestead to exempt it from the operation of the general principle. * * * If the appellant had made the proof in the former case, which he has made in this, the court must have adjudged the question in his favor, or its judgment must have been reversed upon appeal to this court. If he neglected or failed to make the proof, the court could not do otherwise than render the judgment which was rendered in the case." (Tadlock vs. Eccles, 20 Texas R., 782.)

It is thus found that the court could not entertain this suit. There would be no end of litigation, and the right of property would never be safe if a different rule should be allowed to prevail.

The decree of the Circuit Court is affirmed.

STATE OF FLORIDA EX REL. PENSACOLA AND LOUISVILLE
RAILROAD COMPANY, VS. HON. W. W. VANNESS, JUDGE
OF THE FIRST JUDICIAL CIRCUIT OF FLORIDA.

Where a Judge has determined that, under the statutes of this State, he is disqualified from hearing a cause, *mandamus* does not lie to make him reverse that decision and to hear the cause.

This cause came before the Supreme Court by petition for a writ of *mandamus* to compel Judge VanNess, of the First Judicial Circuit, to try certain causes.

The respondent set forth, for the reason of his making an order declining to hear the cause, that the parties complainants in the said causes were related to the wife of the respondent within the ninth degree.

Respondent set forth the statute of December 6, 1862, which provides "that no Judge shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties."

The petitioners maintained that the Pensacola and Louisville Railroad Company was a party to the suit, and that the stockholders, who were interested, were not parties of record to the suit, and, consequently, that the objection of the Circuit Court Judge to trying the cause did not come within the statutory restriction.

C. C. Yonge and R. B. Hilton for the Petitioners.

Papy & Raney for Respondent.

WESTCOTT, J., delivered the opinion of the court.

A *mandamus* does not lie in this case. The only duty which the Judge had to perform was the exercise of his judicial discretion and judgment in the matter of determining his qualification. This he has done, and this writ does not lie to make him reverse his decision, even though it be wrong.

Stark and Wife v. Billings.

GUSTAVE STARK AND WIFE, APPELLANTS, VS. LIBERTY
BILLINGS, APPELLEE.

1. In a proceeding under the act relating to forcible entry and unlawful detainer, the plaintiff claimed that he was lawfully put in possession of the premises by virtue of a writ of possession issued in a former similar proceeding against the husband of one of the appellants; and on the trial, the writ of possession and the proceedings in the former case being produced, and it appearing that no judgment had been entered therein; it is *Held*, that the writ of possession was void, and did not give the plaintiff a lawful possession, or right of possession; and the defendant, having re-entered without force of violence, was not guilty of an unlawful entry.
2. Copies of detached papers, severally certified to be copies of papers filed, and of minutes of the court, purporting to pertain to a cause, are not proper evidence of the proceedings and judgment when offered for the purpose of showing a judgment. The process, pleadings, proceedings, entry of verdict and final judgment, forming the complete judgment record, or a copy thereof certified to be such record, and the whole thereof, should be produced.
3. This entry in the minutes, "Verdict for plaintiff; let writ issue," is not a judgment, and execution thereon is void.
4. The Circuit Court, under the Constitution, has jurisdiction of all actions relating to the possession and the right of possession of real estate, to be exercised in such form as the Legislature may prescribe.
5. A form of oath administered to a jury in a civil action containing matter not embraced in the issue, which was not objected to by either of the parties, will not be considered as error, unless it is evident that the jury were misled thereby.

Appeal from Duval Circuit Court, Fourth Judicial Circuit.

The opinion of the court contains a statement of the case

Friend & Hammond for Appellants.

L. Billings for Appellee.

RANDALL, C. J., delivered the opinion of the court.

This was a proceeding before the Circuit Court by *Billings*, under the statute of 1868, in which he "complained

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that Alpha C. Freeman hath unlawfully turned him out of, and unlawfully and against his consent withholds from him, the possession of certain real estate." It was tried in the Circuit Court for Duval county (the venue having been transferred from Nassau), and a verdict rendered, in favor of the complainant, that the defendants did "forcibly enter" and "turn the plaintiff out of possession," and that they continue to hold possession; and the plaintiff's damages are assessed at \$540.

A motion for a new trial was denied, and Stark and wife appealed.

Precisely how Stark and wife became defendants is not shown by the proceedings, but is presumed from a statement found in the testimony that Mrs. Freeman, after the suit was commenced, became the wife of Mr. Stark, and, upon the verdict, a judgment is rendered against him and his wife for five hundred and forty dollars damages, besides costs.

The first question raised is, that the Circuit Court, by the Constitution, has no jurisdiction of the proceeding for an "unlawful entry," that is, an entry without force, but without lawful right; and that the statute purporting to give this remedy to the Circuit Court, in cases other than for a "forcible entry and unlawful detainer," is void.

In support of this proposition, appellants refer to Section 8 of Article VI. of the Constitution, which expressly gives the court jurisdiction of cases of "forcible entry and unlawful detainer;" and they insist that, this being a special grant of jurisdiction, any other proceedings of this nature, other than for a *forcible* entry, cannot be entertained by the court.

Whatever force there might be in this suggestion, if the clause referred to was the only source of jurisdiction, there is no doubt, if we look at the entire section, of the power of the Circuit Courts to try any cause involving the right of possession of real estate. It says that the Circuit Courts

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shall have jurisdiction in "all cases at law which involve the title or the *right* of possession to, or the possession of," real property. And hence, in addition to the power to try any action or proceeding involving the *forcible* entry into lands which might be provided by the Legislature, the court has jurisdiction, in such form of practice and proceedings as the law may provide, over the entire range of actions relating to real estate.

The plaintiff, in order to make out his case, attempted to show that he was lawfully in possession of the premises in 1869, and that Mrs. Freeman (now Mrs. Stark) and her former husband, who had been in possession up to that time, were then lawfully turned out; and testified that he was then put in possession by the Sheriff of Nassau county by virtue of a writ of possession issued out of the Circuit Court for that county. The writ of possession was then produced, together with certain copies of papers and minutes of the court of the proceedings had in a case wherein Mr. Billings was plaintiff and "S. N. Freeman & Co." were defendants. These were introduced for the purpose of showing the proceedings and judgment, and the delivery of the possession evidenced by the return upon the writ.

The introduction of these papers in evidence was objected to on the ground that they showed no judgment authorizing the writ; that the papers were not, and did not purport to be, a transcript or exemplification of the record in that case, and that, if admitted, they showed that the Circuit Court had no jurisdiction of that proceeding. The Circuit Court overruled the objection, and the papers were admitted in evidence, and, so far as can be discovered, were the only foundation of the plaintiff's possession and right. As this is a part of the plaintiff's case submitted to the jury, we must consider that the jury were influenced by it. Generally, in cases of this kind, it is only necessary for the complainant to show actual possession, and that he was deprived of it by some overt act of the defendant, without being put

to the proof of the origin of his possession or right; but the plaintiff puts in the evidence of his right of possession, and therefore we pass upon the question thus raised.

As to the question whether the copies of papers offered were legal evidence to show the proceedings of the court in the case against S. N. Freeman & Co., we must hold that they were not. These papers did not purport to be, or to show, the entire record of proceedings, but were copies of detached fragments of the case, and therefore were not severally nor collectively a transcript or exemplification of the record and proceedings. They showed that such a suit existed, but did not show the proceedings in that suit. Neither did they purport to show that any judgment had been entered upon the verdict, which seemed to have been rendered by a jury. The last proceeding anterior to the issuing of the writ of possession appears from an entry in the "Bench Docket," thus: "Verdict for plaintiff; let writ issue." This is not a judgment, and did not warrant the issuing of a writ of any kind. (Lincoln vs. Cross, 11 Wis., 91.) The statute says: "If the verdict of the jury shall be in favor of the plaintiff, then and in that case the court shall award a judgment for the plaintiff that he recover possession of the property described in the complaint aforesaid, with his damages and full costs, and shall award a writ of *habere facias possessionem*," etc.

And thus, if these papers prove anything, they show that no judgment was entered in that case; that the writ of possession was not legally issued, and was void; that the plaintiff was not lawfully put in possession, but, as to those already in possession, was a mere intruder and trespasser. It nowhere appears that the defendant in that case, Freeman, or any other person, was actually turned out when Billings went in under that writ, but, on the contrary, that the property of Freeman then in the building remained there; that Freeman soon afterwards died; that a key to the front door was delivered to Billings by the administrator, and that he

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ccasionally went into the front part of the house. then no
nhabited by any person; and that Mrs. Freeman (now
Stark). returning from a temporary absence at the North
re-entered, without "strong hand or multitude of the pe
ple," into the premises she had quietly and voluntarily let
a short time before, as it appears by the case before
Upon these facts alone, we doubt if the jury would ha
rendered the verdict which they did, that she and her pro
ent husband, Mr. Stark, did "forcibly enter upon, and
the plaintiff out of, the possession."

The question was submitted by the court to the jury,
whether the plaintiff "was lawfully put in possession, and
had never been lawfully evicted?" and thus the written
evidence of the proceedings before mentioned was made
important in the deliberations of the jury.

The ruling of the court, therefore, admitting the copies
of papers offered by the plaintiff as the foundation of, and
as evidence of, his rightful possession, was a material error.

It is unnecessary here to inquire whether the court had
jurisdiction to try the case of this plaintiff against S. N.
Freeman & Co., for we have no certified transcript of the
record and proceedings, and it is perhaps not material to
the present case whether it had or had not jurisdiction.

It is assigned for error that the jury in the present case
were sworn to try other issues than those embraced in the
case, but as there was no objection or exception made at the
time, it cannot be reviewed. The proper oath was admini
stered; but appellees claim that they were also sworn to try
matters interpolated into the oath not embraced in the issue.
In the absence of any objection, or any evidence that the
jury were misled thereby, such matter, not pertinent, may
be considered as surplusage. Nor do we see how we can
consider the further question of the right of dower of the
widow of S. N. Freeman, nor how such question can enter
into the case.

The judgment of the Circuit Court is reversed, and the
verdict set aside.

WILLIAM C. ROPER, ET AL., VS. JAMES S. HACKNEY, ET AL.

In an action brought by bill in chancery to subject the real estate of a defendant to sale upon executions to satisfy certain judgments at law, which were obtained upon demands matured and due, while such real estate belonged to the defendant, where it appeared that such defendant has conveyed the property to a third person for a consideration equal to its full value, his wife not uniting with him in the conveyance, or relinquishing her right of dower, and the consideration being paid in three notes of the grantee, due in one, two and three years, respectively, without a mortgage back or other security; and when it further appeared that soon thereafter such grantee reconveyed the same premises to the wife of such grantor, for the same expressed consideration, receiving back the three indetical notes, a small amount of money and some personal property in payment therefor, without any proof that such notes, money and personal property were her separate property: *Held*, that such property would be deemed the property of her husband, that such deeds would be declared and adjudged null and void, and the real estate, thus attempted to be conveyed, made subject to the lien of such judgment creditors.

The court decreeing the sale of the real property of a grantor, upon execution issued upon judgments at law, which it had declared a lien upon the property, his conveyance having been adjudged null and void, cannot authorize the sheriff upon such sale to convey the interests of other than the defendants in execution; nor can it direct the sheriff to put the purchaser of such premises in possession by turning all others out of possession. The purchaser must take such title and right as he may acquire by virtue of the sheriff's sale on execution.

This is an appeal from the Circuit Court of Orange County, Seventh Judicial Circuit.

A statement of the case appears in the opinion of the Court.

Fleming & Daniel for Respondents.

"A deed, made with the purpose or intent to hinder, defraud or defraud creditors, is binding as between the parties, it, as to creditors, it is deemed to have no lawful existence." 6 Fla., 62; also, 1 Story Eq. Juris., Sec. 350, et passim to Sec. 440.

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"Inadequacy of price in a sale of property, where the defendant is justly indebted, is a badge of fraud, and, when associated with other circumstances of suspicion, may be conclusive." Barrow vs. Bailey, adm., 5 Fla., 9.

1 Story's Eq. Juris., Sec. 359: "The conclusion to be drawn from the cases is, that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts (that is, those antecedently due);" and through the section we also refer to the whole of Chap. VII., Vol. 1, Story's Eq. Juris., to show that voluntary conveyances in favor of wife or children, or other, by a person who is indebted at the time, are in fraud of creditors, and held by the courts to be null and void." See Sec. 360, ib: "If it be made with intent to defraud or defeat creditors, it will be void, although there may, in strictest sense, be a valuable, nay, an adequate consideration."

"When property is purchased and paid for by the husband, and the deed is taken in the name of the wife, such acts, coupled with an existing indebtedness of the husband, makes a *prima facie* case of fraud." 13 Fla., 117.

In the trial of the right of property acquired by a married woman through a purchaser, there must be proof that it was made with her separate funds; otherwise, the presumption is that it was through means furnished by her husband. 8 Fla., 136.

In the case at bar there is no attempt made to prove that the property was purchased with the wife's separate funds.

"A debtor in embarrassed circumstances will not be permitted to make a voluntary assignment, or gift of his property, to the injury and detriment of his *bona fide* creditors." 5 Fla., 430.

In the case above cited the gift was to the wife. See also 13 Fla., 117. before cited, in which the Supreme Court take up this whole subject, and examine it fully, sustaining the previous decisions of our Supreme Court that the presumptions are against the exclusion of the wife's property;

that when a husband purchases real estate, taking the deed in the name of his wife, his declaration that the purchase was made at the request of his wife, and that the money paid was his wife's, is not sufficient to establish a purchase with funds belonging to the separate estate of the wife; and that the onus of proof lies on those claiming, under the wife, to show that the funds used belonged to her separate estate.

We claim that, there being no words used in the conveyance from Thomas showing an intention to establish a separate use in Mrs. Hackney, the property is subject to her husband's debts.

"An intention, clearly manifested, to create a separate estate, has always been deemed necessary in our courts." (The language employed must be suitable.) Schouls' Domestic Relations, p. 208; and see the whole of Chaps. X. and XI. of this admirable work on the subject under investigation, where the whole matter will be found exhaustively and most clearly treated.

"When a gift of personal property to the wife during coverture is established, it is presumed, in the absence of testimony to the contrary, to be a gift as her general and not her separate property." 13 Fla., 118.

"It must appear from the instrument that the property was to be the separate property of the wife." 5 Fla., 277; 5 Fla., 430; 8 Fla., 107-117.

But we take the further position, that even though no fraud be proved, and the conveyance from Thomas to Mary J. Hackney be sufficient to vest a separate estate in her, the property is still subject to the debts of the husband, James S. Hackney, because of the failure to record it within the time prescribed by the statute. See Act of March 6, 1845, Sec. 6; Thomp. Digest, 221-2.

In this State, by statute, a married woman may acquire a separate and independent title to both real and personal property, during coverture, by bequest, devise, gift, purchase, or distribution, subject, however, to the same be-

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coming liable to the debts of the husband, unless an inventory thereof is filed and recorded within six months from the time the title vests in her, as specified in the statute. The record of title papers particularly describing the property given to the separate use of a married woman is sufficient inventory and compliance with the statute. Fla., 277; 8 Fla., 136.

In the case at bar the record was not made until more than eleven months after the execution and delivery of the deed.

The Constitution of 1868, Art. 4, Sec. 26, provides that "all property, both real and personal, of the wife, owned by her before marriage, or acquired afterwards by gift, devise, descent, or purchase, shall be her separate property, and not liable for the debts of her husband."

The act of March 6, 1845, may be construed in harmony with this provision of the Constitution, and is not therefore repealed thereby. It simply declares what shall be done by a married woman in order that her separate property shall not be liable for her husband's debts.

It will be noticed also that all of the rights of the parties before the court vested prior to the adoption of the new Constitution, and cannot be divested by its provisions.

Upon examination, it will appear that the deed to Dorsett and Hackney was never acknowledged by Jas. S. Hackney, or otherwise proved for record, and therefore is not properly of record at all. Mrs. Hackney acknowledges to have relinquished her dower, and not to have conveyed her separate estate.

The defendants, who hold under the conveyance from Mrs. Mary J. Hackney and her husband, claim that they are innocent purchasers for a valuable consideration without notice, and that the property cannot, therefore, be reached in their possession, whatever may have been the frauds in the previous transfer of titles.

It is true that the general principle to be found in the

books is, that courts of equity will always most favorably consider the rights of this class of purchasers, often to the exclusion of valid prior liens. But the rule does not apply to the case at bar.

The Legislature, by act of March 6, 1845, conferred upon married women within this State the right to hold property separate and independent from their husbands, under certain restrictions, which are carefully and specifically set forth in the law. Among other restrictions, it is provided by the 6th section of the act referred to that "all the property, real and personal, which shall belong to the wife at the time of her marriage, or which she may acquire in any of the modes hereinbefore mentioned, shall be inventoried and recorded in the circuit court clerk's office of the county in which such property is situated, within six months after such marriage or after said property shall be acquired by her, at the peril of becoming liable for her husband's debts, *as if this act had not been passed*; provided, that any omission to make said inventory and record shall, in no case, confer any rights upon her husband." Thomp. Digest, p. 221-2.

The Supreme Court has held, in Mercer vs. Hooker, that "the record of title papers particularly describing the property is a sufficient inventory and compliance with the statute." 5 Fla., 277.

In the case at bar there was no record made of the deed to Mrs. Hackney for eleven months after its execution and delivery, and eight months after it was proved for record. The property, therefore, by the terms of the law, became liable for the husband's debts.

The deed from Thomas to Mrs. Hackney was not recorded when Dorsett and Hackney took their deed, though more than six months had then expired since it was made; nor was it recorded for two months later, though it was in the power of Dorsett and Hackney to have it done.

No record having been made, as required by the statute.

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the property became subject to James S. Hackney's debts, as if the statute had not been passed, and the lien of plaintiffs' judgments attached, and has not since been in any way divested. 5 Fla., 277.

There the property was a horse, which had passed off into the hands of an innocent purchaser, for a valuable consideration, without notice; yet the court held that it was subject to the husband's debts. 5 Fla., 430.

F. I. Wheaton for Appellants.

Defendant Mills is in possession of the said real estate by deed for valuable consideration, purchased from defendant Dorsett. Mills claims to hold said real estate as an innocent purchaser for a valuable consideration, without notice of any pre-existing fraud, if any there was, in previous transfers of said real estate.

In support of the position taken, it is now the settled American doctrine, says Chancellor Kent, that a *bona fide* purchaser for a valuable consideration is protected under the statute of the 13th and 27th Elizabeth, as adopted in this country, whether the purchase is from a fraudulent grantor or not, or from a fraudulent grantee, and that there is no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers. 4 Kent's Com., 464, 5th ed.

A defendant may object to a bill of discovery that he is a *bona fide* purchaser of the property, without notice of the plaintiff's claims. Another maxim is, that when there is equal equity, the law must prevail; and this is generally true, for in such a case the defendant has an equal claim to the protection of a court of equity as the plaintiff has to the assistance of the court to assert his title, or, as in this case, to define their judgment liens; and that in such case the court will not interfere on either side. It is on this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a *bona fide* purchaser

of the legal estate for a valuable consideration, without notice, if he choose to avail himself of the defence at the proper time and in the proper mode. 1 Story's Eq., 64.

Another and the last maxim in equity is, that it looks upon that as done which ought to have been done. The true meaning is, that equity will treat the subject matter, as to collateral consequences and incidents, as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. 1 Story's Eq., Sec. 64-9.

VAN VALKENBURG, J., delivered the opinion of the court.

The complainants seek by their action to subject certain real estate, which they allege was conveyed, first, by James S. Hackney to Green B. Thomas, then by Thomas and wife to Mary J. Hackney, wife of James S., then by Mary J. Hackney and James S. Hackney to James D. Dorsett and Joseph D. Hackney, and then by the said Dorsett and Hackney to William Mills, to sale for the payment of three several judgments against the defendant, James S. Hackney, upon the ground of fraud in the two first mentioned sales and conveyances of the said real estate.

They pray that the court will declare the two first above mentioned deeds of conveyance null and void, and that they may be produced and delivered up to be cancelled.

The defendants, in their separate answers, deny each and every allegation of fraud in the several sales and transfers as charged in the said bill of complaint, James D. Dorsett, Joseph D. Hackney and William Mills claiming that the said real estate is in the possession of the defendant Mills or his vendee; that Mills purchased the same in good faith for a valuable consideration and without notice of any frauds, if any there were, in the previous transfer of said property.

The question which arises is, was the sale of the premises

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in question made by James S. Hackney to Green B. Thomas on the 16th day of November, 1865, and the subsequent sale from Green B. Thomas and his wife to Mary J. Hackney on the 9th day of March, 1866, made with intent to "delay, hinder, or defraud creditors," and are the conveyances made at those times therefore "void, frustrate and of none effect?"

It is charged in the bill of complaint that the indebtedness of the defendant, James S. Hackney, to the complainants respectively, upon which the general judgments set out therein were subsequently recovered, was, at the date of the conveyance of the said real estate by Hackney to Thomas, fully matured and due. That the judgments so recovered are on the records in the County of Orange, where this land was located.

The property was worth the sum of fifteen hundred dollars, which was the consideration expressed in the deeds, but the wife of James S. Hackney did not unite with him in the conveyance to Thomas, or in any manner relinquish her right of dower in the premises.

In his answer to the bill of complaint, the defendant, James S. Hackney, the vendor, says: "He sold the lands in question to Green B. Thomas for the sum of \$1,500, which this defendant then regarded as the value of said lands. That the said defendant, Green B. Thomas, paid this respondent for said lands at the date of the conveyance thereof in three promissory notes for the sum of five hundred dollars each, respectively due in one, two and three years, and made payable to this defendant or bearer; that said Green B. Thomas made payments at divers times upon said notes of several sums of money, amounting in the aggregate to somewhere between two and three hundred dollars."

The defendant, Green B. Thomas, in his answer, states substantially the same facts as averred by James S. Hackney alleging further that the payments made upon the said notes

"amounting to several hundred dollars, were made by labor in two trips to Orange county from Ocala, in making shoes in considerable numbers for the said James S. Hackney for sale, and in personal labor of my minor sons for and on account of the said James S. Hackney."

In support of their allegation of fraud, the complainants introduce some evidence. Aden Waterman, Sr., testifies that he had a conversation with James S. Hackney in August, 1865, which was but a short time previous to his conveyance to Thomas. In that conversation Hackney said to the witness: "If I sell this place (meaning Clay Spring) to you now, I shall have nothing left but my other place on the Apopka. I owe two or three thousand dollars in Charleston and other places, and I intend to put the money in my pocket which I shall get for it, and when I sell the other place, as it is all I will have left, and that I do not believe in a man's giving up his last dollar to pay his debts."

Subsequently, and after he, Waterman, had purchased Clay Spring from Hackney, they had another conversation. That then Hackney told him he had sold his place and everything he had to Green B. Thomas. That he, Waterman, had previously sold some cattle to Hackney in part payment for the "Clay Spring;" that after this last mentioned conversation, "Green B. Thomas came down to where I then lived, and changed the mark and brand of these cattle into the mark and brand of him, the said Green B. Thomas."

There were fifty head of these cattle so received in part payment for "Clay Spring," and they were delivered to Thomas and the son of James S. Hackney, and they two together changed the marks and brands.

The witnesses, Waterman and Johnson, both testify that Green B. Thomas was a poor man, and that he was a shoemaker. Johnson says "he did not have much property." Waterman says "he did not have any visible property; he was not able to invest \$1,500 in a farm." There is no con-

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flicting evidence upon this point. The conveyance of the same premises, made by Green B. Thomas and his wife to Mary J. Hackney, the wife of James S. Hackney, on the 9th day of March, 1866, was for the like consideration of fifteen hundred dollars. It does not seem to have been recorded in Orange county until the 16th day of February, 1867, more than eleven months after its date, and about three months subsequent to the rendition of the judgment in favor of the complainant, Stewart, against James S. Hackney, the husband of the grantee.

James S. Hackney answers that the consideration expressed in this deed was paid by Mary J. Hackney, to the best of his recollection, in the following manner: "One horse, valued at one hundred and seventy-five dollars; twenty-two hogs, valued at ten dollars each, and somewhere about sixty dollars in currency of the United States, and the balance of the said consideration in the notes heretofore described as made by Thomas to this defendant or bearer, and of which the said Mary J. Hackney was then the legal and equitable holder."

The defendant, Thomas, answers in this respect, "that he received from Mary J. Hackney, as the purchase money of said lands, to the best of his recollection, one horse, one stock of hogs, and between forty and sixty dollars in the currency of the United States of America. That there was great scarcity of money in circulation in the locality of this transaction. That the residue of his obligations for the original purchase money of this place was then cancelled by the said Mary J. Hackney, who represented herself entitled to do so."

James S. Hackney also claims in his answer that his said wife, Mary J., "became the legal and equitable holder, bearer and sole possessor of the rest and residue of the said promissory notes of Green B. Thomas, by reason of advancements made in currency from her own private funds." These notes were the three given by Thomas to Hackney, payable

in one, two and three years in payment for the premises on the first mentioned sale, and there is in the record no evidence of the purchase of them, or either of them, by Mary J. Hackney; neither is there evidence that she had at any time after marriage any separate property or private funds, or that she made any advancements to her husband.

The question of whether there was any intent to "delay, hinder, or defraud creditors," under the statutes of this State, raised by the pleadings and the evidence so introduced, has been passed upon by the court below, and the decree entered in this case adjudges the first mentioned conveyance, from James S. Hackney to Green B. Thomas, to be "null and void," "having been made, executed and delivered for a fraudulent purpose to hinder, delay and prevent the collection of the debts of the said James S. Hackney," and the second above mentioned conveyance "to be null and void for any and all purposes whatever, being a continuation of the said fraud committed by the said James S. Hackney."

The evidence seems to warrant these findings. The deed from James S. Hackney to Thomas, without the usual renunciation of dower upon the part of his wife, when Hackney himself agrees that the consideration expressed in the deed was the full value of the property conveyed, taken in connection with the other facts proven in the case, is one strong badge of fraudulent intent.

It is evident that Thomas was in poor circumstances, a man "without any visible property," yet his promissory notes, payable in one, two and three years, without a mortgage upon the property he was so purchasing, or any other security whatever for the payment of these notes as they became due, are received by Hackney in full for the real estate.

The reconveyance of the same premises in a short time thereafter by Thomas and his wife to Mary J. Hackney, the wife of the previous grantor, for the same amount of con-

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sideration mentioned in that deed, the return of the three identical notes originally given by Thomas, with the addition of the horse, hogs and small amount of currency, are still stronger evidences of such fraudulent intent.

The notes, horse, hogs and currency used by Mary J. Hackney in the payment for this property must be deemed to have been the property of her husband, there being no proof to the contrary. This doctrine has been heretofore held by this court. *Price vs. Sanchez*, 8 Fla., 136; *Alston vs. Rowles*, 13 Fla., 117.

The pleadings and proof show that the defendants, James D. Dorsett and Joseph D. Hackney, took a conveyance of the same premises from Mary J. Hackney on the 14th day of December, 1866; that the consideration expressed in said deed was two thousand dollars; that although signed by James S. Hackney, the husband of Mary J., it was not acknowledged by him in due form of law, and therefore was not properly entitled to be recorded.

It also appears that the said Dorsett and Hackney, through their agent in the purchase of said real estate, had notice of the existence of at least one of the judgments mentioned and set out in complainants' bill of complaint at and before such purchase by them; but the complainants in their bill do not seek to set aside such conveyance, nor does the court below make any decree or order with reference to it.

The defendant, William Mills, purchased of Dorsett and Hackney. It does not, however, appear satisfactorily from the record whether he has a valid conveyance of the premises. Dorsett alleges in his answer, "there was a conveyance to Mills," and Hackney says "he had a deed of conveyance." The bill charges that he had purchased the premises at the time of the commencement of this action. There is no such deed in evidence, and no proof in regard thereto produced or offered. It must be concluded that he was a purchaser previous to the commencement of this action, and it is not shown that he had any knowledge of the

Pre-existing frauds or of any liens upon the said real estate **b**y reason of the indebtedness of James S. Hackney to any **o**f these complainants.

The complainants do not seek by their bill any relief **f**rom the conveyance to him, if one exists, and the court has **a**djudged none in its decree. They simply charge him with **a** knowledge of the previous frauds, but the evidence to **s**upport the charge is not satisfactory.

The decree directs the sheriff of Orange county to **p**roceed without delay to levy upon and sell the lands described **i**n said deeds from James S. Hackney to Green B. Thomas, **a**nd from Green B. Thomas to Mary J. Hackney, to satisfy **t**he judgments and executions entered up and issued in **f**avor of the complainants, and to execute and deliver a good **a**nd sufficient deed for said lands to the purchaser, "convey-**i**ng all the right, title and interest or claim of the said James **S.** Hackney, Green B. Thomas, James D. Dorsett, Joseph **D.** Hackney and William Mills, in or to the said lands to **t**he purchaser or purchasers thereof."

It is difficult to see upon what grounds appearing in the **d**ecree the "interests of James D. Dorsett, Joseph D. Hackney and William Mills" are to be conveyed to the purchaser at the sheriff's sale. Their conveyances are not asked to be set aside, and the decree is entirely silent in regard to them. It is only the two first deeds that are declared null and void. The question as to whether Dorsett and Hackney and William Mills are parties privy to the fraud, is not adjudicated. There is no judgment against them or either of them.

The decree must be modified by striking out of it so much as directs the sheriff of Orange county to convey the right, title, interest or claim of James D. Dorsett, Joseph D. D. Hackney and William Mills in or to said land to the purchaser or purchasers thereof.

It must also be further modified so far as it directs the sheriff to put the purchaser in possession of the premises,

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and to turn all others out of possession. The decree directs a sale by the sheriff upon executions issued upon the judgments named, and the purchaser must take such title as he may acquire by virtue of such a sale. In such case the court should not direct a delivery of the possession under the sheriff's deed.

The decree of the Circuit Court is affirmed, except so far as it should be modified in accordance with this opinion, and the cause is remanded with directions that the decree be so modified and for such further or other proceedings as may be conformable to law and equity.

If, however, the plaintiffs desire to open the decree, and by proper pleadings put in issue the validity of the conveyance from Mary J. Hackney to James D. Dorsett and Joseph D. Hackney, and the subsequent one from them to William Mills, the court below will permit them so to do.

ANDREW E. PATTERSON, APPELLANT, VS. WILLIAM N
TAYLOR AND THEODORE RANDALL, APPELLEES.

1. Taylor mortgaged to Patterson certain personal property, including a growing crop, to secure advances of goods, etc., to enable Taylor, a planter, to make and gather the crop. The mortgage debt not being paid, Patterson commenced suit to foreclose the mortgage, whereupon the mortgagor interposed a defence that the mortgaged property had been selected and set apart to him as "exempt from forced sale under any process of law:" *Held*, that the term "forced sale," as used in the Constitution, is a sale against the will of the owner, and not a sale to which he had expressly consented by giving the mortgage; that having thus, for a valuable consideration, given his consent to the alienation of the property, upon his breach of the condition of the mortgage, he is estopped from revoking it; and the court, in ordering a sale, does but decree a specific performance of the agreement, which agreement was not forbidden by law.

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2. An exemption of property from sale by process of law is a personal privilege, which may be waived by the owner of the property conveying an interest by means of an absolute or defeasible conveyance of property otherwise exempt from such sale.
3. A mortgagee of personal property does not release the property from the lien of his mortgage by his mere silence on being informed that a portion of the property has been disposed of by the mortgagor and delivered to another creditor. His assent to the delivery or other disposition of the mortgaged property might operate to release it so as to protect a third party.
4. An objection to the terms of a mortgage by the mortgagor, before signing, that it included property which he desired to reserve and use in paying a debt to another, cannot vary the legal effect of the mortgage.
5. A lessor of land, the lease being in writing, has no lien for rent upon the crops of the tenant under the provisions of "an act for the relief of landlords," (Chap. 1498, Laws of 1865-6,) until a warrant of distress is issued according to the provisions of that act.

Appeal from a decree of the Circuit Court of Madison county, Third Judicial Circuit.

In April, 1873, William N. Taylor, one of the appellees, executed to Andrew E. Patterson, appellant, a mortgage upon certain chattel property, to-wit: "one bay mule, one bay horse, and all of the corn and cotton that I may make the present year." The consideration was that Patterson had already loaned and advanced to him three hundred dollars, and the agreement by Patterson "to make further loans and advances to me in merchandise to the amount of twelve hundred dollars hereafter, until my crop is made, which said loans and advances are made and to be made for the purpose of enabling me to make, gather, gin, pack, and to deliver to him my cotton and corn crops," etc. The mortgage was duly recorded.

Appellant filed his bill in the Circuit Court of Madison county to foreclose this mortgage for the said advances. The bill alleges that Taylor was planting on the farm of Theodore Randall and complainant; before taking the mortgage or making advances he was informed that Randall had a claim against Taylor for rent of the land for 1873, to-wit:

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that Randall was to receive twenty-one bales of the cotton first to be gathered, and being unwilling to make advances under the circumstances, he agreed with Randall that the cotton to be raised should be divided between them, each taking one bale alternately until the whole should be paid, and that nothing was said in this arrangement about the corn. The mortgage was then executed and delivered by Taylor, and advances made to him to the amount of two hundred dollars; that complainant had received nine bales of cotton and seventy-five bushels of corn, of the value of about six hundred dollars; that Taylor had delivered to Randall six hundred and seventy-five bushels of corn raised on the farm, Randall knowing of the mortgage and that it was unsatisfied; and that there is other cotton and corn in the hands of Taylor, and that he was disposing of it; that he has demanded the cotton and corn in the hands of Taylor, and the corn so delivered to Randall, but they refuse to comply. Randall claims that he is entitled to what has been delivered to him on account of rent and pursuant to a contract with Taylor. Taylor claims that the residue of the property mortgaged is exempted from liability to seizure and sale to satisfy the mortgage, notwithstanding the agreement contained in it that it should be held as such security and sold to satisfy the advances. The bill prays a foreclosure of the mortgage, and that the property be delivered up by Taylor and Randall to be sold, and that an injunction be granted to prevent a disposal of the property, and that a receiver be appointed, etc.

The answers of Taylor and Randall admit the execution of the mortgage for the consideration alleged and the advances by complainant, and Randall denies that he ever waived his right or lien on the crop for the rent, etc., except so far as to consent to a division of the cotton as alleged. Taylor says that when the mortgage was to be signed he objected to the mortgaging of the entire corn crop, on the ground that he had, in a written agreement with Randall,

l to return him six hundred bushels of corn which he had from Randall, and if he signed the mortgage he not comply with the agreement in the event that the crop did not pay the rent and for the supplies, and it was then agreed between him and Patterson that six hundred bushels of corn should not be considered as included in the mortgage, and with this understanding he signed the mortgage; that, pursuant to this understanding and agreement, he returned to Randall the six hundred bushels of corn, which fact was known to complainant and objected to by him; that complainant, in an action against Taylor, levied an attachment upon the property of Taylor embraced in the mortgage, until which time defendants did not know that complainant claimed any interest in the corn that had been delivered to Randall.

Randall claims a special lien upon the crop and other property by virtue of a lease and agreement by which he leased to Taylor his plantation, the rent therefor to be paid by one bag of cotton, and loaned to him his mules, and six hundred bushels of corn for use on the place, the mules to be returned and the corn to be repaid by the value of six hundred bushels out of the crop of that year. (The lease is not recorded.) And Randall says that this agreement was well known to complainant when he took the mortgage and created a lien upon the property to that effect, which was recognized by complainant.

Taylor further answers that, when the property was attached, he applied to have the exemption allowed by the constitution extended to him, and it was done, but the sheriff refuses to deliver the property to him. He claims that all the mortgaged property is exempt from forced sale in the foreclosure proceedings, and demands a decree to that effect, averring that he is the head of a family and residing in this State.

Complainant filed a general replication, and, upon proofs and pleadings, the court decreed that complainant had no

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right at law or in equity to any of the property mortgaged, and that the bill be dismissed. The reasons for this decree appear in a written opinion of the Circuit Judge found in the record, and they are: 1. That the complainant had consented to the delivery of the corn to Randall, the landlord of Taylor, in accordance with an understanding between the parties at the time of the execution of the mortgage; and 2. That the property was exempt from forced sale to satisfy the mortgage debt, it being claimed as exempt by the defendant, Taylor, who could lawfully claim such exemption.

Angus Patterson for Appellant.

Hunter Pope for Appellees.

RANDALL, C. J., delivered the opinion of the court.

The complainant, Patterson, appeals from the decree in this case, and alleges that the court erred in adjudging that the defendant, Taylor, could claim, in this proceeding to foreclose a mortgage upon personal property, that the property is exempt and not liable to be sold under a decree, the mortgagor being the head of a family and residing in this State; the mortgage having been given to secure the mortgagee for advances made and to be made to enable the mortgagor to make his crop, which crop of corn and cotton were a part of the property mortgaged, the mortgage having been duly recorded; and in adjudging that the defendant, Randall, was entitled, notwithstanding the mortgage, to a large quantity of corn covered by the mortgage, which was delivered to him by the mortgagor in payment for certain corn loaned by him to the mortgagor and on account of rent of the plantation, the landlord having no lawful lien upon it by mortgage or otherwise.

These questions are presented upon this record:

Is it competent for the mortgagor of personal property to set up against a bill for foreclosure that the property mort-

gaged is exempt from sale to satisfy a debt secured by mortgage under the Constitution and laws of this State? The Constitution says that "one thousand dollars' worth of personal property * * * shall be exempted from forced sale under any process of law." Art. IX., Sec. 1.

There is no question that the owner of personal property may sell it for money, or to pay a debt, or dispose of his title to it in any other manner, provided the sale be not made under any "process of law." Having this right to control and dispose of his property, has he the power lawfully to subject it to sale, by any process of law, by consenting thereto? and, in such case, is such sale a "*forced sale*?"

In the Court of Appeals of New York, Mr. Justice Denio, delivering the opinion in Knettle vs. Newcomb, (22 N. Y., 249,) it is held that a promissory note, having annexed to it a stipulation "waiving and relinquishing all right of exemption of any property I may have from execution on this debt," is void, because it is against the policy of the law exempting property from sale on execution, which law is designed for the protection of poor men and their families against the consequences of over-confidence on the part of the debtor and over-reaching on the part of the creditor, and because it would in effect give to an execution a greater power than is given to it by the law, and thus control the effect of the process. This has been the almost universal current of the decisions of the courts in this country with reference to such contracts; yet, says the court in that case, "one may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act."

In Texas the law, like ours, exempts certain property from "*forced sale*" upon process of law; and the courts of that State have uniformly held that a sale by virtue of any judgment or decree, founded upon a mortgage of the property, is a *forced sale* within the meaning of the exemption laws and of their constitution, and is therefore prohibited.

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In California it is provided that the exemption from forced sale, on execution or other final process, "shall not extend to any mechanic's, laborer's, or other lien lawfully obtained, nor to any mortgage or other lien lawfully taken or acquired to secure the purchase money for said homestead." The term "forced sale" is used in the constitution as well as in the statute. The Supreme Court of that State, in *Patterson vs. Hornblower*, (33 Cal., 266,) says: "The several homestead acts were enacted to give effect to this provision. A 'forced sale' is not synonymous with a sale on execution. The latter may be, and often is, voluntary in every respect. * * * Its quality, as being voluntary or forced, depends not on the mode of its execution, but upon the presence or absence of the consent of the owner. If those terms were synonymous, or were so understood by the Legislature, the provision would have been that the homestead shall not be subject to sale under execution or other legal process. As the clause now stands, and with the interpretation contemplated for, no meaning or effect can be given to the word 'forced.' The meaning of a sale on execution or other final process is plain, and needs no interpretation; and the word 'forced,' unless it is to be rejected as insensible, must qualify the phrase with which it is connected. If it is rejected from the statute, it must have the same fate in the clause of the Constitution directing the enactment of the statute. But we think there can be no question that enforced sale means a sale against the will of the owner. It is apparent, upon reading the whole act in connection with the constitutional provision, that it was not the intent, either of the framers of the Constitution or of the Legislature, to prevent the owner or owners of the homestead property from voluntarily alienating, changing, or otherwise affecting it. The homestead was not forced upon him, but he was at liberty to avail himself of its protection or not at his election, and if accepted, to waive it at his election—the consent of his wife, if he was a married man, being required in

order to secure to her also the protection of the homestead exemption. * * It makes no difference, in respect to its being forced or voluntary, whether he consents directly to the sale or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under a power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of the Constitution or the statute." See also *Chamberlain vs. Lyell*, 3 Gibbs, Mich. R., 448.

The language of our Constitution, in respect to the exemption of real and personal property, is, that it "shall be exempted from forced sale under any process of law." but, in reference to real estate, it "shall not be alienable without the joint consent of husband and wife, when that relation exists." Of course this condition, the consent of the wife, is not required in the sale or other alienation of personal property.

It is held in Texas that any sale by means of the process of a court is a *forced sale*. The courts of that State agree that the exemption laws are designed to protect the man and his family in the enjoyment of the property necessary to their comfort, and against privation and poverty; and yet they hold that if a mortgage contains a power authorizing the mortgagee to sell and convey the homestead without the aid of the process of a court, it may be enforced and the law is satisfied. The prohibition, is that the mortgagee shall not have the aid of a court to enforce the contract. This is according to the letter of the law as they construe it, and the result is that the humane provisions of their exemption laws are rendered null by the simple device of foreclosing a mortgage by means of a power of sale contained in the mortgage.

There is nothing in our Constitution to prohibit the Legislature from changing the law relating to foreclosing mortgages hereafter executed, so as to authorize the mortgagee,

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upon default of payment, to sell the mortgaged property, real or personal, at public or private sale, and to execute a deed or bill of sale and deliver possession, without the protecting vigilance of the courts, and thus render nugatory, as in Texas, all the protection of the exemption laws, even if we should hold to the same construction given to them by the courts of that State.

If the framers of the Constitution had designed to prohibit all judicial sales, even by the consent and procurement of the owners, it would have been a very easy thing to have so declared, as was done in a neighboring State.

In the Constitution of Georgia it is provided that each head of a family "shall be entitled to a homestead of realty to the value of two thousand dollars in specie, and personal property to the value of one thousand dollars in specie, both to be valued at the time they are set apart; and no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart," including improvements, except for taxes, for purchase money, &c.

This is sufficiently clear and explicit. In Florida it is provided that certain real and personal property "shall be exempted from forced sale under any process of law," and thus not prohibiting all sales, but only "forced sales," in this State. It is further provided that the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists, and therefore this property may be alienable with the joint consent of husband and wife; and we may hence conclude that the words "forced sale" and alienable by "consent," are to be construed with reference to their bearing upon each other and upon the subject matter, and that the property may be "alienable" by any means known to the law if the consent be obtained, and if consent be obtained, it is not a forced or involuntary alienation.

If, again, the framers of the Constitution had intended to

Prohibit the contingent alienation by means of a mortgage of any property, they would have used unequivocal language to express that intention, and thus placed beyond the reach of legislative control the power to encumber by mortgage, or to authorize a sale by virtue of a power to be inserted in a mortgage by the mortgagee at a public or private sale without the process of a court, as in done in Texas and in some other States.

That they did not so frame the prohibition implies that they did not intend to prohibit the mortgaging of any species of property, whereby an alienation of it might ensue, the consent being the only condition required in respect to the real estate to render it "alienable."

As to personal property, the same rule will prevail as to the effect of the term "forced sale," as in regard to real property.

All the courts are constrained to sustain the exemption laws upon grounds of public policy and humanity. These considerations doubtless controlled in the framing of our Constitution. If there ever existed a people requiring protection of this character at the time of the adoption of that instrument, that people inhabited these Southern States, just emerged from a long and destructive war. Nearly all were poor—many entirely destitute—and many having only the soil of their former flourishing plantations and homes, without money, without farming implements or stock, and all practically at the mercy of creditors, whose demands probably exceeded the then cash value of the productive lands in these States. Capital had gone elsewhere, and but for the means brought from afar to aid them, our planters were utterly helpless. Under the most favorable circumstances it must take long years for these people to recuperate and bring themselves up to a condition of comparative prosperity. Money and supplies, even food and clothing, must be had from abroad to enable them to live and cultivate their broad acres. The laboring classes were equally

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destitute and dependent upon the making of crops. Means could be had to aid the people in their straits, but not without security to the lender and the merchant. Was it the intention of the law-makers to take from all these people the last resources, the power and the means of securing the creditor for the advances necessary to enable the people to preserve life itself? Did they intend to proclaim to the merchant that no safe security could be given for such advances, because the new law would not permit the enforcement of liens upon the property pledged to secure them? Did the public law permit that in whatever form a pledge might be made the borrower might, at any time, withdraw it and declare it a sham and a fraud? If this were the case, God save the people! The basis of private pecuniary credit is security and confidence, and it could not be expected that the merchant would advance his money and his property with no security and no means of reimbursement. And if the law-makers intended to deprive the people of the ordinary means of obtaining credit, they might have so declared in unmistakable terms. Then the people might have yielded to their fate of poverty and helplessness, and have gone, if they could find the means of going, to a more favored land; but if such was not the intention, then industry and enterprise could help itself out of poverty and wretchedness by the ordinary means of upright honorable business transactions, and so they did.

We do not believe it was the intention of the Constitution to deprive the citizens of the common rights and privileges pertaining to property and credit, so far as to render their condition abject and hopeless in their poverty, beyond its express provisions, and the evident intention must control our construction of its language without doing violence to it. Motives of public policy and humanity come to our aid in sustaining this conclusion. And there are considerations of policy and humanity in so construing the law as to enable all people to demand the specific execution of their

Contracts when such contracts do not contravene the law. It is a humane provision that men and families, through misfortune, shall not be stripped of the little property necessary to their comfort and subsistence, and when one gives credit by lending money or selling goods without security, he does so in view of the laws exempting certain property from forced sale, and the creditor cannot complain, for he extends credit with full knowledge of the rights of the debtor and his family, relying alone upon his remedy at law. And where a borrower obtains a loan of money by a pledge and consent, legally given, that certain specified property shall stand as a security for the loan, he does so in view of the legal result that if the loan be not paid, the property which was pledged as the security, and without which the loan would not have been obtained, will be sold to pay the debt. The law providing the remedy is before the debtor when the pledge is given and enters into the contract, and cannot be changed so as to affect the contract. Both parties have assented to it, and the action of the court is but carrying out specifically what has been consented to; so that the decree of the court, instead of effecting a *forced* sale, merely compels the parties to abide by their specific agreement, and the sale is decreed in pursuance of that contract. Having so consented, he is estopped from withdrawing the consent. Should it be decreed that he may do so and thus entrap the lender, policy and humanity might well cry out in behalf of the lender and in behalf of *his* wife and children, who are thus impoverished and brought to want.

We are of opinion that Taylor, having executed a mortgage in due form of law upon the crop of cotton and corn and the other personal property named, which he might lawfully do, and having received the stipulated consideration, cannot now select this property as exempt, and thus avoid and defeat his solemn covenant. To allow this in the present case would be certainly inequitable. Taylor, with-


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out the means of cultivating the soil and making the crop, mortgages the growing grain to obtain the necessary supplies. He so obtains twelve hundred dollars and raises a crop, and after paying for the labor employed, saves perhaps a thousand, having in the meantime supported himself and family out of the supplies. Having then a thousand more than he commenced with, he takes refuge behind the exemption law, keeps the thousand dollars, and the benefactor "whistles down the wind." Public policy and humanity cannot sanction transactions of this character.

II. We proceed to examine the pleadings and evidence to ascertain whether the court erred, as alleged, in deciding that the complainant has no rights as against the defendant Randall to the corn delivered to him by Taylor in payment of so much corn borrowed of him by Taylor, and on account of Randall's claim for rent. If the corn was exempt from sale to satisfy the mortgage upon it, there would be no necessity of further inquiry; but as we do not find that it was exempt from the mortgage lien, we must dispose of the other branch of the case.

The facts, as understood from the record, are that Taylor was a tenant occupying the land of Randall for the year 1873; that Randall was to receive for the rent of the plantation twenty-one bags of cotton, to be delivered out of the first cotton ginned and packed; and Randall agreed to furnish to Taylor such farming utensils as he had, six mules and six hundred bushels of corn, and at the end of the year Taylor was to return the plantation, farming utensils and mules; also, as soon as the crop should be made, to return the six hundred bushels of corn and a certain amount of fodder. This agreement was in writing, but not recorded.

Patterson testifies that Randall first applied to him to know whether he would furnish Taylor with supplies to run the plantation. That Patterson refused, because Randall was to receive the first twenty-one bales of cotton. After-



wards Taylor and Randall came to P.'s store and again asked him if he would furnish supplies to Taylor, and he replied that he would if Randall would waive his right to the twenty-one bales and come in with him *pro rata*, (i. e., one bale to each alternately,) and he, P., should take a mortgage on Taylor's entire crop to secure him. Randall refused this. Afterwards Randall met him and agreed to the proposition—the amount of supplies agreed on to be \$1,200, including some \$300 which he had already furnished Taylor. In April Taylor gave P. a mortgage to secure him for advances and loans to the amount of \$1,200, for the purpose of enabling Taylor to make the crop and deliver it; and by the terms of the mortgage Taylor sold to Patterson “one bay horse and one bay mule and all of the corn and cotton that I may make the present year.” Taylor further covenanted to cultivate at least one hundred and seventy-five acres in cotton and one hundred and forty acres in corn—to gather, gin, pack and deliver the cotton to Patterson at his store on or before the first day of November, and to gather and house the corn and hold it subject to Patterson's order. That if sufficient corn and cotton should not be made to pay the advances, Taylor was to deliver the horse as well as the cotton and corn, provided, that if Taylor should pay the amount of loans and advances by the first of November, the instrument to be void. This mortgage was duly witnessed, proved and recorded April 22, 1873, in the county clerk's office. Patterson furnished Taylor to the amount of \$1,200 in supplies, and received on account of it nine bales of cotton, seventy-five bushels of corn and eleven dollars and sixteen cents in cash and a quantity of cotton seed, and Taylor yet owes him six hundred and forty-one dollars, besides interest; never released any of the stock or crops from his mortgage. Randall knew he was to take the mortgage, and never objected to it. Patterson knew Randall had loaned Taylor six hundred bushels of corn, but never heard from either of them that the corn was to be

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returned before he, P., was to be paid for his advance. Understood Randall was to have twenty-one bales of cotton for the use of the plantation and mules, and that the six hundred bushels of corn was to be returned in the fall. Understood from Randall that the cotton would be sufficient to pay them both. Nothing was said about Randall waiving his right to anything except the cotton, and only to the extent that each should receive one bale alternately until witness was paid for his advances. At the time Taylor made the mortgage he did not say anything to witness nor did witness hear anything said about the six hundred bushels of corn. Witness did not get more than the nine bales of cotton, because it was not ginned and packed. Witness heard Taylor had applied to have his property set apart under the homestead and exemption laws, and then sued out an attachment against him. There was no agreement that witness and Randall should divide the corn; they did the cotton. Randall asked witness if he was going to divide the corn as they had done the cotton, and witness told him he would not; but, rather than have a trouble about it, he would divide everything raised on the place; but Randall refused to divide the six hundred bushels of corn. Did not agree that Randall should take seventy-five bushels of corn. Randall insisted that witness should authorize Taylor to deliver him as much corn as he got, but witness did not agree to it; but after the cotton was divided would see about the corn. Witness understood, at the time he was hauling some corn he had bought of Taylor, that Taylor had delivered six hundred bushels to Randall, and never raised any objection till he got out his attachment. All these conversations were within a short time before the attachment. Witness heard that Taylor had sold some corn and this prompted him to get out the attachment.

R. M. Witherspoon testified that Patterson and Taylor both requested him to draw up the mortgage. When it was read to Taylor he remarked that he had borrowed \$

hundred bushels of corn from Randall that he had to pay back. Witness told Taylor it was a mere matter of form—there would be plenty of cotton to pay the mortgage, and when the mortgage was read Taylor signed it. This was at Patterson's store. Thinks Patterson was not present when the remark was made. L. H. Patterson, a witness, was present when the mortgage was read, and witnessed it; did not hear Taylor say anything about the corn.

W. N. Taylor, sworn, says—When Witherspoon called him in to sign the mortgage complainant was present, and on reading the mortgage, witness told W. to stop; he had borrowed six hundred bushels of corn from Randall that had to be paid back out of that crop; that Patterson did not look at witness, nor make any reply; would not have signed the mortgage if he had known it would have deprived Randall of the corn. Witness turned over to Randall about six hundred bushels of the corn; did not notify Patterson that he had done this, as he did not think it necessary, but casually remarked one day, in a conversation with P., that he had turned it over to Randall, to which Patterson made no objection. Afterwards Randall wanted the corn delivered formally in the presence of witnesses, which witness did. Patterson was informed by witness about the contract with Randall before the mortgage was signed.

Theodore Randall, sworn—Informed Mr. Patterson of the terms of his contract long before the mortgage was executed. Witness has never waived his right to the six hundred bushels of corn. Stated to P. that he was willing Taylor should give him a mortgage on all the corn except the six hundred bushels. There was conversation afterwards about dividing the corn raised in excess of the six hundred bushels, and seventy-five bushels each were delivered to witness and Patterson. Witness never alluded to the six hundred bushels in telling Mr. P. that he thought he would be secure, if witness told him so. Patterson insisted that the six hundred

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bushels should be divided between them in like manner as the cotton, but witness would not consent to it.

This is a brief synopsis of the testimony which is deemed to bear upon the controversy.

Randall, it seems, had a contract, embraced in the body of the lease, that six hundred bushels of corn should be furnished by him to Taylor, and that Taylor should return the like quantity out of the crop to be raised. The lease was not recorded, nor did Randall take any other security for the corn furnished.

Chapter 1498, Laws of 1865-6, entitled "an act for the relief of landlords," provides that on failure to pay rent under a written lease, the landlord may obtain a warrant of distress against the goods and chattels of the tenant, and *such writ* shall be a lien on all the crops grown on the land during the year. This applies to the rent only, not to supplies furnished.

Chapter 1739, Laws of 1870, provides that any person who shall procure a loan or advance of money or goods, to aid him in the business of planting, farming, etc., may give a lien *superior* to all other incumbrances, excepting for labor, provided the borrower shall give an instrument in writing consenting to such lien, which shall be recorded in the records of the Circuit Court of the county, etc.; and all conflicting laws are repealed.

Mr. Randall, having failed to put on record any evidence of his lien, if he had a lien, had no right to take the corn or crop in satisfaction of his loan, as against the mortgagee, Mr. Patterson, whose mortgage was duly recorded and covered the whole crop. It can make no difference with the legal rights of the parties that there was an understanding at the time of the execution of the mortgage contrary to the effect of the instrument itself. There was a bare agreement between Randall and Taylor that the six hundred bushels of corn should be returned, and undoubtedly Patterson knew of it. The indebtedness of Taylor to Randall

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had no greater dignity than his indebtedness to any other person which may have been intended to be paid out of the crop, or contracted to be paid out of the crop. Taylor had a right to give the mortgage and to create the lien, and, indeed, Patterson was urged by Randall, as well as by Taylor, to make the advances, the only stipulation as to dividing the crop being that which related to the cotton, which it seems was finally complied with, so far as there was any delivery of the cotton. Taylor, it is true, objected to signing the mortgage on account of his agreement with Randall, but finally did sign it, all parties believing, we presume, that the cotton would be sufficient to satisfy the rent and Patterson's advances also. Patterson swears that he was assured by Randall, before the advances and the mortgage, that he would be safe, because the cotton would be sufficient to pay them both. He says he knew that Randall had loaned Taylor the corn, but never heard from either of them that it was to be returned before he was to be paid for the advances.

Upon well settled principles, no agreement or understanding anterior to the making of the mortgage can vary the express terms of the contract. There is no ambiguity in the terms of the mortgage. Mr. Patterson, then, by the effect of the mortgage, had a lien upon and a lawful right to subject the entire mortgaged property to the payment of the indebtedness secured by the mortgage. Randall might have had his security, but failed to comply with the statute, and thus subordinated his claim to that of the more vigilant creditor. There is no fraud or mistake in the mortgage which authorizes the court to set it aside or vary its effect.

Did Patterson say, or do, or agree to anything, after his mortgage was obtained, which authorized the other parties to so dispose of the mortgaged property as to affect his lien upon it? We do not find that he did. He seems to have felt secure until it was found that the crop was not sufficient

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to pay both debts. He expressly assented to a division of the cotton, so far as it was divided, but we find no express assent to releasing the corn. Finding that Randall had taken the six hundred bushels of corn, he denied Randall's right to it, yet offered to divide it as in case of the cotton, but Randall declined this offer; showing that Patterson did not intend to abandon his rights altogether, but that he was willing to share the loss, if any, with Randall. It is testified that Taylor "did not notify, but casually remarked one day in conversation with Patterson," that he (Taylor) had delivered the corn to Randall, and that Patterson did not make any objection. This was after the corn had been delivered to Randall, and it does not appear that at this time there would be any danger of loss; and this silence on the part of Patterson is far from being an authority for the delivery. Soon afterwards, finding that the crop was being otherwise sold and disposed of, Patterson set about securing himself. If it appeared that Patterson had, at any time after the execution of the mortgage, consented that Taylor might deliver any portion of the crop, as in the case of the division of the cotton, he would be bound by it so far as a delivery was made; but a mere offer to divide, not acquiesced in or accepted, is not binding upon him.

Upon the whole evidence, it does not appear that Patterson released any portion of the mortgaged property, unless it be in reference to the division of the cotton, and he is therefore entitled to the relief demanded by his bill.

The decree of the Circuit Court is reversed and set aside, and the cause remanded, with directions that further proceedings may be had in conformity with this opinion, and according to the law and equity of the case, and the practice of the court.

**S. FORBES DOGETT, APPELLANT, vs. PHILIP WALTER, TAX
COLLECTOR CITY OF JACKSONVILLE, APPELLEE.**

- 1. - The twenty-third section of the act to provide for the incorporation of cities and towns, etc., approved February 4, 1869, which granted to the city or town council the power to levy and collect taxes upon property, real and personal, for the use and good government of the city or town, and for carrying out the purposes of its organization, was not repealed by section seventy-nine of an act for the assessment and collection of revenue, approved June 24, 1869.
- 2. - The meaning and intention of the Legislature, in the enactment and repeal of laws, may often be found in the cotemporaneous and subsequent action of that body in reference to the subject-matter, and the evident intention of the Legislature will control the construction of its acts.

Appeal from Duval Circuit Court, Fourth Judicial Circuit.

A statement of the case appears in the opinion of the court.

S. Forbes Doggett and *S. Pasco* for Appellant.

The question presented by the pleadings for the decision of the court is, whether the Legislature authorized the city of Jacksonville to impose a tax of two per cent. upon real and personal property for the year 1874.

This question arises out of the constitutional limitations upon the power of taxation, viz: "No tax shall be levied except in pursuance of law." See Constitution, Art. 12, Sec. 3.

The Legislature shall authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes, and for no other purpose; and all property shall be taxed upon the principle established for State taxation. The Legislature may also provide for levying a special capitation tax, and a tax on licenses; but the capitation tax shall not exceed one dollar per annum for

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all purposes, either for State, county, or municipal purposes. See Constitution, Art. 12, Sec. 6.

The Legislature is prohibited from passing special or local laws for the assessment and collection of taxes for State, county and municipal purposes. See Constitution, Art. 4, Sec. 17.

Another provision of the Constitution out of which the question arises is as follows:

The Legislature shall establish a uniform system of county, township and municipal government. See Constitution, Art. 4, Sec. 21.

The Legislature has carried into effect the foregoing grant of power by the passage of the act of 1869. Chap. 1688, 2d Sess. Leg., 1869; pamphlet Laws, p. 22.

There is no limit to the amount of tax which the city or town council have power to raise upon all real and personal property within the corporation by virtue of the act of February 4, 1869. Sec. 23, Act Feb. 4, 1869. It is not intended to question the constitutionality of this section, which it is believed can be successfully done, because it will be shown that it is repealed.

The first proposition submitted is, that the power to levy taxes and make local assessments, conferred upon municipal corporations, may, in the absence of constitutional restriction, and when the rights of creditors are not impaired, be changed at the pleasure of the Legislature. See Dillon on Municipal Corporations, Sec. 608, pp. 34, 35, 36, 39, 41, 44, 52.

The next proposition is, that the twenty-third section of the act of February 4, 1869, was repealed by the act of June 24, 1869, the seventy-ninth section of which is in the following words: "All acts and parts of acts heretofore passed relating to assessment and taxation are hereby repealed." See Acts Extra Sess., 1869, p. 23.

In the year 1872 another act was passed for the collection of revenue, the sixth section of

authorizes cities or towns to levy a tax upon real and personal property, which shall not exceed the amount of State tax. The twenty-fifth section of said act provides that "all assessments made and taxes levied after the passage of this act shall be in pursuance of the provisions of this act." Sec Act of Feb. 29, 1872, p. 45, Secs. 6, 25.

The act of February 29, 1872, is repealed by the act of February 17, 1874; so also is the act of June 24, 1869. See Act Feb. 17, 1874, Sec. 66, p. 29.

The Act of February 14, 1869, repealed by the act of June 24, 1869, is not revived by the act of February 17, 1874, repealing the two acts of June 29, 1869, and February 29, 1872, for two reasons: 1. Because the act of February 17, 1874, for the assessment and collection of revenue, takes the place of all the repealed acts. 2. Because "no statute of this State which has been repealed shall ever be revived by implication." See Thomp. Dig., p. 22, Sec. 3.

The act of February 17, 1874, is the only law for the assessment and collection of taxes for State, county and municipal purposes; and the only tax incorporated cities are authorized to impose by the provisions of this act is a license tax. See Act Feb. 17, 1874, Sec. 11, p. 11.

The language of the Act of February 17, 1874, is restrictive, and intended to exclude all things which are not enumerated. *Expressio unius est exclusio alterius*. Dwarris on Statutes, p. 605.

A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. Judges are bound to take the act of Parliament as the Legislature has made it. Dwarris on Statutes, p. 598.

A statute conferring authority to impose taxes must be construed strictly. See 4 Fla., p. 402.

In construing the words of an act of Parliament, and collecting from them the intentions of the Legislature, the terms are always to be understood as having a regard to the subject-matter; for that, it is to be remembered, will always

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be in the eye of the framer of the law, and all his expressions directed to that end. Dwarris on Statutes, pp. 581, 646.

Recurring to the general revenue act of June 24, 1869, and the effect the seventy-ninth section, the repealing section of said act, has upon the general incorporating statute by which municipal corporations are created in this State, it is submitted that the principle that general legislation on a particular subject must, in the absence of anything showing a different intent on the part of the Legislature, give way to inconsistent special legislation on the same subject, cannot be recognized or applied in this case, because there is no municipal corporation in this State created by charter or special legislation; none can be so created—the all are all created by a general incorporating statute.

"The power of taxation," says an eminent writer, "is a great governmental attribute with which the courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations." Cooley's Const. Limitations, p. 494; Sedgwick on Const. and Stat. Law, 414.

In addition to the foregoing, it is urged that if the twenty-third section of the act of 1869 (Chap. 1688) has not been repealed, as is maintained, then the amendment to it (Chap. 2045) is valid, and that only authorizes a tax of one and a half per cent. to be levied. In that case, we are entitled to a part of the relief prayed for, namely, an injunction against the excess or one-quarter of the tax levied.

Finley & Finley for Appellee.

There are but two questions raised by the record in this case:

1. Whether the assessment in question was, at the time it was made, authorized by law?
2. Whether the sale of the property, under said assessment, would deprive the owner of it without due process of law?

The first question necessarily includes the second; for if the assessment was authorized by law, then the sale of the property, so far as the assessment is concerned, would be legal and binding; but if the assessment was unauthorized, then the sale would be invalid, and the purchaser would take no title by his tax deed.

We therefore address ourselves to the consideration of the first question, which is: "Was the assessment mentioned, at the time it was made, authorized by law?"

The Constitution, in positive terms, requires the Legislature to authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes. Constitution, Art. XII., Sec. 6.

Has the Legislature complied with this requirement?

We answer that it has, in the twenty-third section of the act of February 4, 1869, entitled an "act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this State."

The twenty-third section of the act just referred to authorizes incorporated cities and towns "to raise by tax and assessment, upon all real and personal estate, and by any other constitutional method of taxation, within the corporation, any and all sums of money that may be required for the use and good government of the city or town, and for carrying out the powers, rights and duties herein granted and imposed, and to enforce the receipt and collection thereof in the same manner as the assessments and taxes of the State are collected." (See Act 1869, p. 27—second session under Constitution of 1868.

This was a full compliance with the requirements of the Constitution, and only limited incorporated cities and towns in the assessment and collection of taxes to such amount as might be required for their "use and good government, and for carrying out the powers, rights and duties imposed," etc.

We affirm that section twenty-three of the act of Febru-

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ary 4, 1869, (the general incorporation act,) was in force at the time the assessment in question was made.

The seventy-ninth section of the revenue act of June 24, 1869, did not repeal the general incorporation act of February 4, 1869, nor did it repeal the twenty-third section of the last named act.

That the seventy-ninth section of the act of June 24 *did not* repeal the act of February 4, 1869, is too clear to require argument; while to say that it repealed the twenty-third section of the last named act would be to assert that the Legislature, in utter disregard of the Constitution which required it to authorize incorporated cities and towns to impose taxes, etc., deliberately took away from them such authority after it had been conferred, and then left them with important rights to exercise and duties to perform without the power to exercise those rights and discharge those duties, which would be an unreasonable construction.

Every statute must be construed so as to give it a reasonable effect. Blackwell on Tax Titles (Rules of Interpretation), p. 625—citing 3 Mass., 523; 5 Mass., 380; 7 Mass. 458; 15 Mass., 205; 2 Pickering, 571; 23 Pickering, 93.

Statutes must be so construed as to suppress the mischief, advance the remedy, and *preserve fundamental principle*. Blackwell on Tax Titles, p. 620, No. 135—citing Coke, Littleton, 381 b.; 8 John., 41; 10 John., 467.

The law does not favor a repeal by implication, unless the repugnance be quite plain; and such a repeal, carrying with it a reflection on the wisdom of former Legislatures, has been confined to repealing as little as possible of the preceding statutes.

So, when two acts of the Legislature are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication. Dwarrris on Statutes, p. 156-7.

When there is a difference in the whole purview of two

statutes (as in this case, one being an incorporation act and the other a revenue act,) apparently relating to the same subject, the former remains in force. Dwarris on Statutes, p- 158.

It is true that the revenue act of February 29, 1872, did limit the city and town taxes to the amount allowed by law to be imposed for State purposes; but the last mentioned act, it is to be observed, *did not contain any repealing clause whatever*, and did not conflict with the general power to impose taxes, nor the purposes for which they might be imposed, under the twenty-third section of the incorporation act of February 4, 1869, but only *limited the amount* which might be imposed for corporation purposes.

Now, the revenue act of February 17, 1874, repealed both the revenue acts of June 24, 1869, and of February 29, 1872; and it is contended that the sixth section of said act of 1872 only operated as a temporary repeal or suspension of the twenty-third section of the act of February 4, 1869, in respect of the rate of city taxation, and that, upon the repeal of the act of 1872, the twenty-third section of the incorporation act of 1869 was relieved from the operation of such temporary repeal or suspension, re-acquired all its original force and effect, and was the only remaining law in the statute book under which city taxes could be imposed.

On every act professing to repeal or interfere with the provisions of a former act, it is a question of construction whether it operate as a total, or partial, or temporary repeal. Dwarris on Statutes, 158.

Whether the twenty-third section of the act of February 4, 1869, was in force at the time the taxes in question were imposed by the city of Jacksonville is a judicial question and to be judicially decided; but it will not be considered out of place to invite the attention of the court to the act of February 27, 1875, which amends the twenty-third section of the incorporation act of 1869, simply to show that in the opinion of the last Legislature the said twenty-third

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section was in force up to the time of said amendment Acts of 1875, p. 57.

It is also very manifest that the Legislature, in the passage of the act of February 17, 1874, repealing the revenue acts of 1869 and 1872, did not intend to leave incorporated towns and cities without the power to impose taxes for corporation purposes, from the fact that the fifty-sixth section of the said act of 1874 authorizes the tax collector of any city or incorporated town to proceed substantially in the same manner, in the collection of taxes and sale of land for the non-payment of taxes, as collectors of revenue. Act of 1874, p. 25.

And the sixty-first section of the same act authorizes the clerk of any incorporated town to make deeds for land sold for taxes, etc. Act of 1874, p. 27.

Thus showing that it was the intention of the Legislature, in repealing the act of 1872, to remove the temporary suspension of the twenty-third section of the act of February 4, 1869, and to restore said section to the full scope of its original operation.

Upon the foregoing argument and authorities, it is contended for the appellee that at the time the taxes in question were imposed, the twenty-third section of the incorporation act of February 4, 1869, was in force, and that the imposition of said taxes was authorized by law; and that a sale under said assessment did not deprive the appellant of his property without due process of law, and in violation of the constitution in any of its provisions.

RANDALL, C. J., delivered the opinion of the court.

The appellant filed his bill to restrain the tax-collector of the city of Jacksonville from selling appellant's lots with in the city for taxes thereon assessed for the year 1874, upon the ground that the taxes were assessed without authority of law. It is alleged that the property was taxed at the rate of two *per centum* for municipal purposes for that year,

Whereas it is alleged that there was no law authorizing the levying of any tax except for licenses.

The Circuit Judge refused to grant the injunction prayed, from which the complainant appealed.

The only question raised is, whether there was any law of the State in existence authorizing the levying of city taxes upon property when this tax was levied in 1874?

The sixth section of Article XII. of the Constitution reads: "The Legislature shall authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, and for no other purpose, and all property shall be taxed upon the principle established for State taxation."

Section 23 of an Act to provide for the incorporation of cities and towns, &c., approved February 4, 1869, reads thus: "That the city or town council shall have power to raise, by tax and assessment, upon all real and personal estate, and by any other constitutional method of taxation, within the corporation, any and all sums of money that may be required for the use and good government of the city or town, and for carrying out the powers, rights and duties herein granted and imposed, and to enforce the receipt and collection thereof in the same manner as the assessments and taxes of the State are collected."

Section 24 authorizes the city council to provide for the election of a treasurer, assessor and collector of taxes. (Laws of 1869, Ch. 1688.)

It is claimed that the twenty-third section above quoted was repealed by the seventy-ninth section of an act for the assessment and collection of revenue, approved June 24, 1869, which reads as follows: "All acts and parts of acts heretofore passed, relating to assessment and taxation, are hereby repealed."

The latter act contains no express reference to the general act of 1869, nor any provisions in regard to levy taxes. It is an act providing

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the mode and manner of assessing and collecting taxes, the property to be assessed and the duties of assessors and collectors and of the county commissioners, and prescribes nothing in regard to city taxes except that the charge for licenses by counties and cities shall be fifty per cent. of the amount charged by the State. (Sec. 14.)

Next we have "an act for the assessment and collection of revenue in this State," which became a law February 29, 1872. (Ch. 1887.) The twenty-fifth section provides that "all assessments made and taxes levied after the passage of this act shall be in pursuance of the provisions of this act." It repeals the seventy-ninth section of the act of June 24, 1869, above quoted, and amends said act in several particulars, and affects the subject of city taxes only by providing (Sec. 6) that the board of equalization of any county, city or town, at their meeting for equalizing the county, city, or town tax, shall determine the amount of money to be raised by tax to defray the annual expenses, such tax not to exceed the amount of the State tax and the amount necessary to pay the interest on bonds issued by the county or city. The State tax was fixed at eleven mill on the dollar, and to be levied upon the real and personal property. Section thirteen provides that the tax collector of any city or incorporated town shall proceed substantially in the same manner, in the collection of taxes and sale of lands for the non-payment of taxes, as collectors of revenue. Section sixteen also provides for the sale and redemption, and deeds to be executed upon sales of land, by the treasurer of the county or city, for taxes. Section eighteen provides that the clerk of the city shall execute deeds for lands sold for the non-payment of city taxes.

The next law on the subject is the act for the assessment and collection of revenue, approved February 17, 1874. The appellant insists that the eleventh section of this act contains the only authority remaining in the city to collect revenue, and that by this section it is only authorized to

impose a license tax. It provides that no person shall engage in any business or occupation mentioned unless a State license shall be first obtained therefor at the rates specified, and that incorporated cities and counties may impose such further license taxes or rates for county or municipal purposes, not exceeding one-half the amount levied by the State, etc. The sixty-sixth section repeals the above named acts of June 24, 1869, and February 20, 1872.

And this is the appellant's proposition: that the twenty-third section of the act of February 4, 1869, (commonly known as the general municipal incorporation act,) was repealed by the seventy-ninth section of the act of June 24, 1869, which repealed "all acts and parts of acts heretofore passed relating to assessment and taxation;" that the act of February 29, 1872, authorized cities to levy a tax upon real and personal property not exceeding the amount of State tax; and that all assessments and taxes must thereafter be levied in pursuance of that act; that the act of 1872 was repealed by the act of February 17, 1874; that the several repealing acts do not, in express terms, revive any law already repealed, and hence the city has no power to raise any tax whatever, except for licenses.

Let us examine this act of 1874 further as to its bearing upon these propositions. It provides that real and personal property, not expressly exempted, shall be subject to taxation in the manner provided by law. By section six, all lands shall be assessed in the county, *town*, *city*, etc., in which the same shall be. By section eight, the real estate of incorporated companies shall be assessed in the county, *city*, *town*, etc., in the same manner as property of individuals. By section eleven, cities and counties may impose license taxes. Then follow the general directions as to the time and manner of making the assessment, the equalization and correction, the issuing of the tax warrant, proceedings for collection by sale of real and personal property; and section fifty-six provides that "the tax collector

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of any city or incorporated town shall proceed substantially in the same manner, in the collection of taxes and sale of lands for the non-payment of taxes, as collectors of revenue." Section fifty-eight provides for the redemption of lands sold for taxes by payment of redemption money to the county clerk or collector of any city or town, who shall give a certificate of redemption. Sections sixty and sixty-one provide for the execution of a deed by the city clerk if the lands are not redeemed from the sale for city taxes. None of these acts purport to confer upon incorporated cities and towns the express power to levy taxes upon real and personal estate, except the twentieth and twenty-third sections of the act of February 4, 1869, which are claimed to be repealed.

The twenty-third section of that act, as we have found, expressly confers upon the city or town council the power to raise, by tax and assessment upon the real and personal estate, any and all sums of money that may be required for the use and good government of the city or town, and for carrying out the powers, rights and duties imposed upon them, and to enforce the receipt and collection thereof in the same manner as the assessments and taxes of the State are collected. The question, then, is, Does section seventy-nine of the act of June, 1869, amend or repeal that section, and destroy the power there conferred? The language is: "All acts and parts of acts heretofore passed, relating to assessment and taxation, are hereby repealed." The title of the act containing this repealing clause is, "an act for the assessment and collection of revenue." It directs that all lands shall be assessed in the county, town or city where the same shall be, and authorizes the cities to levy license taxes; and beyond this it is but a general act, designating the property liable to taxation, and prescribing the time and manner of assessing property and collecting taxes and licenses. The bill, by its title, purports this and nothing more, and the body of the bill pur-

scribes nothing more. It makes no reference to the incorporation act, and is in full consonance with it; and some of its provisions, as that all lands shall be assessed in the town or city where situated, can have no signification whatever, if the power to assess property by city governments was abrogated.

If the Legislature did not intend, by the act and the general repealing clause used, to destroy the power of the city to levy taxes and provide the means of its support, but only to change the mode of executing the power, and this intention is apparent from the act and the collateral action of the Legislature, such intention must prevail. "In the construction of a statute," says Semmes, J., in the opinion of the court in *Bryan vs. Dennis et al.*, expressing a well settled rule, "all laws *in pari materia* should be considered in order to ascertain the will of the Legislature; for that which is within the intention of the makers of the law is as much within the statute as if in the letter; and the intention of the Legislature may often be collected from the cause or necessity of enacting the law."

Lord Mansfield, in *Rex vs. Loxdale*, 1 Burr., 447, says: "Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other." And see Kent's Com., Vol. 1, 460, *et seq.*, and a very valuable collection of maxims and authorities found in Blackwell, Tax Tit., 606-634. The citations of counsel from Dwaris and other authorities are in accord with the above rules.

In recent cases in the Supreme Court of the United States, it was held that a resolution of Congress defining and declaring the intent and meaning of an act of Congress, controlled the judicial construction. (*Bigelow vs. Forrest*, 9 Wallace, 339.)

The argument of the appellant's counsel is, that the section of the city incorporation act which did confer upon

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the municipal authorities the *power* to levy taxes is swept away by the language of the repealing act, which repeals "all laws heretofore passed relating to assessment and taxation;" and yet every act passed relating to the subject of taxation has recognized the existence and validity of this section by providing the mode and manner of its exercise. The Legislature have treated it as unrepealed, and have regarded the phraseology of the repealing act "relating to assessment and taxation" as referring to the mode and machinery of levying taxes, and principles of taxation, and not to the power. This harmonizes with the view of this court in the case of *Shear vs. Commissioners of Columbia County*, 14 Fla., 146, as respects the effect of this repealing clause, in which case it was held that a law providing a remedy against illegal assessments, though relating to the subject of assessments, was not affected by the repeal. The construction contended for would, in effect, destroy every municipal government in the State by abrogating its power to do what it is required to do. We have shown, by an examination and recital of the details of the several acts passed since the repealing clause, that the Legislature contemplated the continued exercise of the power of taxation by the city and town councils. (See also Chap. 2045 of the Laws of 1875, amending the very section which is claimed to be repealed.)

It is argued that the law-making power may be exercised even to the complete annihilation of the power to levy taxes by municipal bodies, as, it is claimed, was done by the supposed repeal. In view of the provision of section six, Art. XII., of the Constitution, requiring that the Legislature *shall* authorize incorporated towns to impose taxes on property and license taxes for municipal purposes, it may be well doubted whether the Legislature can, after conferring the power, abrogate it to such extent as to render the corporation impotent, unless it be intended to destroy the corporate organization itself.

Having concluded that the section conferring the power to levy the taxes upon property is not expressly or by implication repealed, but treated by the Legislature in every instance as still in force, we inquire, has that section been amended in any manner so as to affect the power to levy the tax in controversy? The constitutional provision in regard to amendment of statutes requires that the section, *as amended*, shall be re-enacted at length. (Sec. 14, Art. IV.) We do not find that this has been done. The act of February 29, 1872, limited the amount which cities might levy upon property to the maximum amount of the State tax (which was fixed at eleven mills,) *and* the amount necessary to pay interest on bonds issued. This is a mere limitation as to amount, not as to the power to levy, and did not become a part of the section in question. It was a limitation of the discretion, without affecting the power to tax, and has the same effect as if it were an additional independent section of the incorporation act. The act of 1874 repeals this act of 1872, leaving no statute in existence limiting the amount, save the original section twenty-three of the act of incorporation, which authorizes the city council to raise the amount necessarily required for the use and good government of the city and for carrying out the powers granted and duties imposed.

The order of the Circuit Court is affirmed.

 Broward v. Hoeg.

MONTGOMERY L. BROWARD, ADMINISTRATOR OF CHARL
BROWARD, APPELLANT, VS. HALSTEAD H. HOEG, APPELLEE

1. In an action brought by H. against M. B. as administrator of the estate of C. B., to foreclose a mortgage on real estate given by C. B. in his life-time, the defendant in his answer alleging that C. B. held the land in trust for certain other persons, it appearing in the record that H. was a *bona fide* purchaser by mortgage for a valuable consideration without notice of such trust, eight years having elapsed between the acquisition of the title by C. B. and the commencement of the action for foreclosure: *Held*, that it was not necessary to make the alleged beneficiaries parties defendants in the action.
2. Prior incumbrancers as mortgagees are not necessary parties in an action to foreclose a subsequent mortgage.

Appeal from the Circuit Court of the Fourth Judicial Circuit, Duval county.

The opinion of the court contains a statement of the case.

Finley & Finley for Appellant.

A. A. Knight for Appellee.

VAN VALKENBURG, J., delivered the opinion of the court.

There can be no question as to the facts in this case as disclosed by the pleadings.

John Broward died in the fall of the year 1865, and his son, Charles Broward, administered his estate as the executor of his last will and testament. There was no specific devise by the testator of what is called in the answer the "Spanish grant," a tract of about ten thousand acres of land, covered by the mortgage which the complainant is seeking to foreclose. In the year 1865 the lands of John Broward were duly libelled in the District Court for the Northern District of Florida, and such proceedings were had in that court, under an act of Congress entitled "An act to confiscate property used for insurrectionary purposes," passed August 6, 1861, that they were duly sold at

public sale in the same year, bought by Charles Broward and subsequently conveyed to him. In the month of February, 1871, Charles, then having this title to the land, borrows of the complainant the sum of two thousand dollars, and to secure its repayment executes and delivers a mortgage upon this "Spanish grant" and other lands, conditioned for the repayment of the said sum in three months. He fails to pay the amount due at its maturity, and dies in the year 1873. His brother, Montgomery L. Broward, this defendant, is then appointed administrator of his estate, and enters upon his duties. In March, 1874, more than eight years after the purchase of these lands by Charles Broward, and over three years after the date of the mortgage given by Charles to this complainant, this action is commenced against this defendant to foreclose the same. The defendant, in his answer to the bill of complaint, claims and alleges that Charles Broward bought and held this land, not only for his own benefit, but as trustees of thirteen others, heirs-at-law of John Broward, deceased, and that by reason of their being beneficiaries, they should be made parties defendants. It is also claimed in the answer that George Wilson and James Wilson should be made parties defendants, for the reason, as it is alleged, that they own and hold a prior incumbrance upon the same lands covered by the mortgage attempted to be foreclosed. The defendant further claims that at the public sale of said premises in 1865, under and by virtue of the decree of the District Court for the Northern District of Florida, at which sale Charles Broward became the purchaser, he publicly announced that he purchased these lands for the heirs of John Broward, then deceased, and that the conveyance of the premises so sold, subsequently made by the marshal to Charles Broward, was so made to him by mistake. The complainant excepts to this answer of the defendant, the court below sustains such exceptions, and the defendant appeals to this court from that order.

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The conveyance made by the marshal to Charles Broward seems to have been acquiesced in by all parties for over eight years. No attempt to rectify the alleged mistake seems to have been made. From what appears in the pleadings we are led to suppose that Charles Broward, during his life, was in the actual possession of, using and controlling the premises as his own. He made one mortgage upon it to George and James Wilson, and subsequently borrows a large sum of money from this complainant, securing its repayment by the execution of this mortgage.

The complainant in this action, so far as the record discloses, had no notice of any such trust as is alleged in the answer; he dealt with Charles Broward as the owner of the land holding the fee. The consideration for the mortgage was two thousand dollars in money paid to the mortgagor at the time of its execution and delivery; it was not given to secure the payment of an antecedent debt. There is no want of good faith or fair dealing upon the part of the complainant; the consideration was valuable and the security was supposed to be good. There can be no doubt as to the rule applicable in such a case.

Against a *bona fide* purchaser, for a valuable consideration, without notice, a court of equity will not interfere. The purchaser has equal rights with the vendor to the protection of the court. This is the well established rule. Story's Eq. Jur., § 108, 139, 165, 410, 436.

It is equally well established in this State that a "mortgagee is a purchaser to the extent of his interest in the premises, within the meaning of the term purchaser." This has been settled in this court in the cases of Gibson vs. Love, 4 Fla., 233; Glinski vs. Zawadski, 8 Fla., 405; also in Ledyard vs. Butler, 9 Paige, 132.

It would not, therefore, seem to be necessary or even proper to make the several persons named in the answer of the defendant as beneficiaries parties on account of the trust alleged, for the complainant, who is the mortgagee, is enti-

tled to all the rights of a *bona fide* purchaser for a valuable consideration and without notice. Neither is it necessary to make them parties at the bare suggestion of the administrator. He has no interest as such administrator which requires that they should be made parties. He sets up no defence in his character of administrator; he represents only the estate of his intestate mortgagor, who, if alive, could not require the alleged beneficiaries to be made parties. Had the existence of the trust been known to the complainant, the rule might be different as to the necessity of making them parties.

We cannot see that it is necessary to make the prior incumbrancers, George and James Wilson, parties defendants in this action. Their mortgage, as appears from the record, is a prior lien, and their rights under it can in no way be affected by the result of this action. Their interests are paramount to those of this complainant. The purchaser on a foreclosure sale in this action, should one be decreed by the court, would be put in the place of the mortgagor, and these mortgagees would be left in the same situation in which the commencement of this action finds them. Daniel's Ch. Practice, Vol. 1, 214; Story's Eq. Pleadings, § 193; Hilliard on Mortgages, Vol. 2, 92-5; Wright vs. Bundy, 11 Ind., 398.

The order of the court sustaining the exceptions to the answer is affirmed.

Purviance v. Broward.

JOHN S. PURVIANCE, APPELLANT, VS. CHARLES BROWARD
EXECUTOR, ETC., RESPONDENT.

Under the act of Congress of March 2, 1867, entitled "An act for the more efficient government of the rebel States," and the act of July 19, 1867, amendatory thereof, the officer commanding the military district in which Florida was embraced was authorized to suspend a sheriff in the exercise of his power to sell property under execution.

Appeal from the Circuit Court of Jefferson county, Second Judicial Circuit.

The opinion of the court contains a statement of the case.

J. J. Finley for Appellant.

At the time the military order was made, there existed in Florida a government complete in all its departments—executive, legislative and judicial—and it is contended that at the military commander had no power to interfere with the legitimate functions of either without the clearest authority of law; and it is submitted that no such power was conferred by the act of Congress of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States."

Section one of said act provides for the division of said States into military districts, making Georgia, Alabama and Florida the third district.

Section two authorizes the President to assign to the command of each of said districts an officer of the army.

Section three defines the duties and powers of the said military commanders, and limits them to the protection of "all persons in their rights of person and property; to suppress insurrection, disorder and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals;" and to the end that these duties might be performed, and these powers executed, the said military commanders were authorized to "allow local civil tribunals

to take jurisdiction of and to try offenders, or to organize military tribunals for that purpose."

Section six provides that any civil government which may exist in said rebel States shall be deemed *provisional only*, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supercede the same.

It is submitted that the act of Congress referred to does *nowhere* confer the power on a military commander to prevent the execution of the judgment or decree of a court in a civil proceeding.

Florida was, at the time of the promulgation of said military order, a provisional government, and her courts were in the full exercise of all their judicial functions—at least, so far as the supervising control of the United States was concerned; for, as it will appear from the act of Congress above referred to, the military commanders of districts were limited in their powers to matters of a criminal nature.

It is, therefore, contended that the military commander, in this case, had no lawful power to forbid, nor in any way to hinder or delay, the execution of the decree in favor of the appellant.

Wm. Bryson for Appellee.

It cannot be denied that the military which governed the State did have the authority to make such an order and to impose it. Then, why should it not be held valid and binding? The good and orderly people all obeyed it, and shall those who saw proper to violate it take the advantage of it? I do not think it would be just or right.

The rules adopted in modern warfare are, that the conqueror adopts and enforces the laws of the conquered country, if they have any, until they are abrogated, or sees proper to adopt others; and this country had adopted that policy long before the unhappy difficulty between the North

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and the South. It is only necessary to refer to the instructions of President Polk, in his letter to the Secretary of Treasury, on the 23d day of March, 1847, in which he declared that the conqueror possessed the right to establish a temporary military government over such seaport towns or provinces, and to prescribe the terms of commerce with such places; that he might, in his discretion, exclude trade or impose terms upon it. Kent's Com., Vol. I., p. 98, Sec. 92, note c.

It cannot be pretended this was not a conquered country. We all remember it. And the Supreme Court of the United States has repeatedly recognized this authority, and held that the military had authority to appoint judges to hold courts, and that their decisions were binding. 12 Wallace, 173. In the State courts of Tennessee it was held, in Hefferman vs. Porter, 6 Cold., 391, that a judgment of a tribunal known as the civil commissioners, created by order of the commander of the Federal forces at Memphis in April, 1863, was binding, and a bar to any other action upon the same cause of action. Mr. Justice Ellett, speaking for the court, says "the establishment of legal tribunals for the adjustment and protection of civil rights in the most favorable condition for the conquered people," etc. Then, if Tennessee was a conquered people, so were we, and we had the same kind of government, the powers of which were supreme.

It may be contended, as it was before the referee, that this is or will be a hard case. I answer that it is the appellant who caused it, and that if he has any decree or judgment that he supposes is a lien upon this land, the court will allow the elisor to amend his return, and he can again levy upon the land, when the defendant can have an opportunity, in a proper proceeding, if he has a bona fide title, to prevent his casting a cloud upon his title by any sale of the land.

WESTCOTT, J., delivered the opinion of the court.

This is an action of ejectment brought before the enactment of the Code, but prosecuted and decided in conformity to the practice of the Code, it having been enacted during the time the action was pending. The defendant interposed a plea of not guilty. The case was tried before a referee. Upon the trial, the plaintiff offered in evidence a deed executed on the 20th of March, A. D. 1868, from John Q. Stewart, elisor, to John S. Purviance, to the land in controversy. To the introduction of this deed the defendant objected, on the ground that the sale of this property under execution was prohibited by General Orders No. 18, issued by Maj. Gen. Meade, who was at that time commanding the Third Military District, embracing the States of Georgia, Florida and Alabama, on the 29th day of January, A. D. 1868, and that the sale was therefore void. The objection to the introduction of the deed was sustained by the referee; the deed was ruled out, and judgment was awarded in favor of the defendant and against the plaintiff. The plaintiff excepted to the ruling of the referee; his exception was noted; and this presents the only question to be considered in the case. It is not denied that the sale was had in violation of this order, nor is it denied that the sale was void if the order was authorized by the acts of Congress controlling the subject. The point here made is, that no such power was conferred by the act of Congress of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," it being insisted that this was the origin and measure of the authority of the general commanding the military district.

The power of the commanding general was not alone derived from the act of March 2, 1867, but was also derived from the act, supplemental thereto, of the 19th July, 1867. 15 U. S. Stat., 14. This order of the commanding general prohibited any sheriff or other officer of the State from selling under execution or other legal process, in this State,

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any property, real or personal, and declared that any sale so made should be null and void. The second section of the amendatory and supplemental act of July 19, 1867, provides that the commanding general shall have power, subject to the disapproval of the General of the Army of the United States, and to have effect until disapproved, whenever in the opinion of such commander the proper administration of the act of March 2, 1867, shall require it, to suspend or remove from office or from the performance of official duties, and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil office in such district. Congress through that act, also declares that the purpose, intent and meaning of the original act was to render governments the existing in these military districts, if continued, subject *in all respects* to the military commanders of the respective districts and to the paramount authority of Congress. The third section of the original act gives the commanding general power to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, etc. Under this legislation, it is too clear to admit of any argument that Congress did confer authority upon the commanding general to prohibit sheriffs and other officers from selling property under execution. The acts confer in plain terms the authority to suspend any officer from the exercise of official powers, and the order now under consideration directed the sheriffs and other officers not to exercise the power and duty of making sales under execution. The original and supplemental acts confer, in so far as Congress could, the most plenary authority over the entire subject upon the military commanders.

Judgment affirmed.

JOSEPH FINNEGAN, APPELLANT, VS. THE CITY OF FERNANDINA AND GEORGE WASHINGTON, CLERK OF SAID CITY, APPELLEES.

1. Equity will not enjoin the collection of taxes by a municipal corporation from the property of its creditor until the debt due by the corporation to such creditor is paid. A tax is not the subject matter of set off.
2. Equity will not enjoin the sale of property for taxes on account of irregularities in the matter of notice of time and place of sale.
3. A court of equity will not devise some method to recover a debt because of failure to recover the debt through the ordinary legal remedies.

Appeal from the Circuit Court of Nassau county, Fourth Judicial Circuit.

Joseph Finnegan files his bill in the Circuit Court of Nassau county against the city of Fernandina. After alleging the corporate existence of the city, he says that in October, A. D. 1860, the said city made and executed its bond to him for the sum of \$3,300, payable on or before the 4th day of October, A. D. 1863, with interest, payable annually at the rate of eight per cent. per annum; that the consideration for said bond was real estate situate within the said city, sold by him to the city. That the city failing to pay either principal or interest of said bond, he filed his petition in the Circuit Court of Nassau county in the year 1866, praying for a writ of mandamus to compel payment. That after appearance, argument and hearing a peremptory writ was awarded, and that up to the year A. D. 1869, payments amounting in the aggregate to the sum of three hundred and thirty-eight dollars, were made, since which time the city has refused to make any further payment, and there is now due him \$6,523. Complainant further states that by various devices of the city, and through the leniency of the court, the city has failed to carry out the order of the court in the matter of levying and collecting taxes to pay his

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debt, and has refused to comply with the order of the court. That the city has, for more than nine years, resisted and wilfully disobeyed all the mandates and orders emanating from the law side of the court. That he is the owner of a number of lots in the city of Fernandina, upon which the said city has levied a tax for the year A. D. 1873, amounting in the aggregate to the sum of \$121.69. That he has offered to allow a credit to the city of Fernandina for the amount of his tax upon the indebtedness of the city to him, which offer the city has failed to accept. That on the 28th February, A. D. 1874, the clerk of the said city inserted an advertisement in the "*Fernandina Observer*," in which he gave notice that he would sell on Monday, the 23d day of March, 1874, within the legal hours of sale, before the courthouse door in the city of Fernandina, his said lots, or so much thereof as will pay the city taxes thereon for the year 1873, with costs. That subsequent to the said 28th day of February, this notice was changed as to the day of sale so as to read the 6th day of April, A. D. 1874. That said notice is not in compliance with law, and that said clerk has no authority, under the law, to advertise or sell property to enforce the payment of city taxes. That the individuals composing the city government are insolvent. That unless relief is extended to him as prayed, he is remediless.

Plaintiff prays that the clerk may be enjoined from selling, from advertising and from offering to sell his said lots, either on the 6th of April, A. D. 1874, or at any other time or place, to pay the city taxes for the year 1873. That the city of Fernandina and its officers may be enjoined from collecting city taxes from him until the city shall have paid and discharged the full amount of his debt, principal and interest, accrued and to accrue thereon, with costs, as required by the writ of mandamus against the city.

To this bill the defendant interposed a demurrer. The grounds of the demurrer were:

First. Under the Constitution and laws of the State of

Florida the municipal corporation, known as the city of Fernandina in 1860, is dissolved.

Second. That the city of Fernandina received no consideration for the alleged debt.

There was final judgment for the defendant upon this demurrer.

Upon this appeal appellant seeks a reversal of the judgment upon two grounds—

First. Because the demurrer states facts that do not appear on the face of the bill; that it is a speaking demurrer.

Second. Because the facts stated in the demurrer furnish no defence to the case made by the bill.

Fleming & Daniel for Appellant.

Friend & Hammond for Appellees.

WESTCOTT, J., delivered the opinion of the court.

This cause was heard in the Circuit Court upon demurrer to the bill of complaint. The principal question discussed in this court was the dissolution of the municipal corporation of the city of Fernandina. The view we take of the case renders it unnecessary to examine that question. There is no equity in the bill, and consequently the decree of the Circuit Court dismissing the bill was correct. There are three questions presented by the facts set up in the bill. These questions are:

First. Will a court of equity enjoin the collection of taxes by a municipal corporation from the property of its creditor, until the debt due by the corporation to such creditor is paid? Will it set off such debt against the tax?

Second. Will a court of equity enjoin the sale of property for taxes on account of irregularities in the matter of notice of time and place of sale?

Third. Will the failure to recover a debt through the ordinary legal remedies justify a court of equity in devising some method to accomplish that end?

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To the first question: The amount which the citizen pays to the government through taxation is not regarded as the settlement of a simple contract or matter of indebtedness, capable of being accurately estimated in value in the same manner as an ordinary indebtedness existing between individuals. A public use, a public benefit to all and to each, is one of the essential ends sought to be obtained through such taxation. The public good, through the instrumentality of local municipal governments, exercising political, governmental and civil powers and functions, is the object sought to be attained, and the power of taxation is an essential means given to reach this end. A court of equity should not assume such powers as would, in any event, embarrass the attainment of these ends by the corporation. To enjoin the collection of municipal taxes due upon property owned by individuals, to the extent that there is a debt from the city to such individuals, is the exercise of a power of appropriation and interference with public trusts and the exercise of delegated sovereign powers which has not received the sanction of any court. The amount of the tax is not strictly a debt due by the person. Its collection is enforced without suit, and in many other respects there is a difference. (7 Wall., 80.) It is a burden imposed upon property, the return for which it is presumed the tax-payer receives in the matter of benefit through police regulations and other results incident to municipal government. The exact amount of benefit which each citizen receives from the exercise of such powers is not the subject of precise calculation. Taxes and public revenues are not subject to executions against municipal corporations. Upon the same principle, salaries due officers of a municipal corporation are not, in general, subject to garnishment. As a matter of abstract right and morality, it is unquestionably true that all the property and funds of a debtor, whether it be a corporation or an individual, should be subject to compulsory process at the suit of the

creditor, and this is the general theory of the law. Even this rule, however, is subject to many exceptions, such as exemptions allowed from motives of public policy. In the matter of municipal revenues and taxes, the rule at law is that they are exempt from execution, unless by statute they are made so liable. The same principle which exempts them at law would not permit a court of equity to allow a creditor to set off his debt against his taxes. To this extent a court of equity would be administering the general revenues of the corporation and assuming municipal discretions. There is no lien upon the fund to be enforced; and there is no trust in connection with the debt, unless the general abstract power and duty to tax to pay debts is itself a trust. This is no more a trust than the duty and power of every individual who has funds to pay debts is a trust.

In treating of the matter of set-off and taxation, the Supreme Court of New Jersey remarks: "Debt is the subject-matter of set-off, and is liable to set-off; a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government, and destructive of the very end of taxation." 2 Dutcher, 399; 3 Met., 526; 26 Vmt., 486.

The next question is, will a court of equity enjoin the sale of property for taxes on account of irregularities in the matter of notice of time and place of sale? If the tax is due—and that such is the case is not here denied—the party should pay it. A court of equity will not aid him in resisting the just and legal demands of the government. It will not step in, for such reasons, and protect a party in not paying a tax which he admits is due. This is a very familiar principle, obtaining in all of the States.

The only other question remaining is, will a court of equity, on account of the failure of the *mandamus* proceeding, devise some method to enforce payment of the debt?

Substantially, this proposition was considered by the Su-

The Trustees of the In. Im. Fund v. Gleason.

preme Court of the United States in the cases of Rees vs. T ~~the~~ City of Watertown, (19 Wall., 107,) and the case of He ~~the~~ vs. The Levee Commissioners, (19 Wall., 658.) It is held in these cases that the failure of the ordinary legal rem ~~edy~~ does not confer any jurisdiction upon the court of chance ~~ry~~. Because the proceeding has not been used at law with s ~~uff~~icient success by the plaintiff to secure his debt, cannot j ~~ust~~ify a court of equity in devising some method to acco ~~m~~plish that end.

The judgment is affirmed.

THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, APPELLANTS, VS. WILLIAM H. GLEASON, RESPONDENT —

1. A court of equity will decree performance by a trustee of a contract, when such contract conforms to the law of his trust and his duty as to the improvement of the trust property, and where there is performance by the party with whom the contract is made.
2. Where the specific performance of such a contract is sought, affecting to a great extent the interests of the *cestwis que trust*, they should be parties to the suit.
3. Under the provisions of the Internal Improvement law of this State, it is the duty of the Trustees of the Fund to make such arrangements for the drainage of the swamp and overflowed lands as is most advantageous to the fund.

Appeal from Duval Circuit Court, Fourth Judicial C ~~ir~~cuit.

The Trustees of the Internal Improvement Fund, on t ~~he~~ 4th of February, A. D. 1869, contracted with W. H. Gl ~~ea~~son to ditch and drain certain swamp and overflowed lan ~~ds~~ in the State of Florida, agreeing that whenever he sho ~~uld~~ open or dig ditches or drains containing fifty thousand fe ~~et~~, cubic measure, and should make to the board a certificate of

the fact, under oath, attested by the county surveyor or a magistrate, duly qualified, of the county where such ditches or drains are located, and furnish such other testimony of the facts as might thereafter be required by the board, the said Gleason, or his legal representatives, should be allowed to purchase from the State lands within the limits above prescribed; and the board would sell and convey to the said Gleason all the interest which they have or may have to six hundred and forty acres of said swamp and overflowed lands, for each and every fifty thousand cubic feet so certified, from time to time, upon payment of the sum of forty dollars per each six hundred and forty acres of land so purchased. The parties then made other stipulations, which it is unnecessary to mention.

Gleason now brings this bill against the trustees, alleging that he has dug a ditch containing three hundred thousand cubic feet, in township 42, range 43 east; that said ditch is of the character agreed upon; that it was necessary for the drainage of the lands in the vicinity; that it has actually drained and reclaimed them; that he has offered and tendered to the trustees the sum of two hundred and forty dollars, and requested a conveyance of lands agreed to be conveyed under the contract, *and that said trustees admit that he has performed his contract*, and decline and refuse to perform their contract, upon the sole ground that they had no power or authority to make the said contract. To this bill the defendants interposed a demurrer, alleging generally a want of equity, which, upon a hearing, is overruled. From this judgment they appeal.

H. Bisbee, Jr., for Appellants.

The appellants insist that the case of *Bailey vs. Trustees*, 10 Fla., 112, has settled the following three legal propositions, to-wit:

1. That the act of 1855 creating said trustees is constitu-

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tional, and that the trustees must execute their trust as specified in said act.

2. That a holder of one of the internal improvement bonds has the right to have said lands applied to pay the interest on said bonds until the same is paid.

3. That when the trustees are applying said land for other purposes, a holder of a bond has a right to an injunction to restrain the misappropriation.

It follows, as a matter of course, that the Supreme Court having adjudged that such are the rights of the bondholders, the trustees are bound to protect and assert such rights to the exclusion of all claims hostile thereto.

Thus this court has laid down the law, and the appellants must be guided by it. *It is plain that the appropriating the lands to dig a ditch is not applying them or their proceeds to pay interest on bonds.*

We cannot look to the consequences of such a construction of the law. It may arrest every effort at internal improvement, however wise or advantageous. It may render impossible every noble enterprise to develop the resources of the State; stifle every industry, repel capital and labor from our shores, until all the industries of the State shall perish.

The consequences of the law can never be considered in passing a judgment of what the law of a given subject is.

It may be argued that the act of 1855 is repugnant to the proviso in the second section of the act of Congress granting the swamp and overflowed lands to the State, which provides that the lands or their proceeds shall be applied exclusively to reclamation by means of levees and drains, and therefore unconstitutional and void.

It may be argued by the complainant that his rights under the contract are consistent with the act of Congress, and that his contract is in effect carrying out the act of Congress.

Our answer to this is, that the words of the act of Con-

ess are those of a present grant, which passes the fee to the State. Besides, the law provides for a patent to issue to the State. That the fee having passed to the State, the State can do as they please with the lands, and consequently pay the same to pay interest on railroad bonds.

The general government cannot control the disposition of the land after granting the title to the State; it cannot impose a restriction upon the power of alienation. Such a proviso is repugnant to the nature of the estate granted, to wit, the fee, and therefore void. 4 Kent Com., 130-1; 1 Denio, 448; 14 Wend., 348; 16 Wend., 320; 1 John. C. R., 10; 15 Ga., 103.

"It is a settled rule that when a proviso to a grant is repugnant to the grant itself, the grant is good and the proviso is void." 3 Wall., J. C. C., cited in Brightly's Federal Digest, 816.

There is no doubt the law of these authorities applies to this case, and that the proviso restricting the disposal of the land by the State is void.

"Words of present grant pass the fee." 13 Pet., 499; 15 Pet., 677, 328.

If, then, the proviso in the grant is void, the State had the right to appropriate the lands to pay interest on railroad bonds. This court has said that they have been applied to this purpose, and until the interest on such bonds is entirely paid, they cannot be appropriated to other purposes. The Gleason contract being for other purposes, such contract is illegal, and consequently the complainants have no equity. This is the end of the matter.

D. P. Holland of counsel for Appellee.

It is contended on behalf of the appellee—

1. That the said act of Congress of September 28, 1850, formed a contract between the United States on the acceptance of the same by the State of Florida, and that the contract required the State to appropriate the lands granted to

the purpose of reclaiming them. Statutes at Large, Vol. 9, p. 519.

This act of Congress has been construed by the Supreme Court of the United States in *McGee vs. Mathis*, 4 Wallace, 155. The Chief Justice, delivering the opinion of the court, said:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject matter, sufficient consideration and the consent of minds.

"The contract was binding upon the State, and could not be violated by its legislation without infringement of the constitution.

"The contract required the State to appropriate the land granted to the purpose of reclaiming them."

This decision was made in December term, A. D. 1866, of the Supreme Court of the United States, and being the interpretation of an act of Congress, we respectfully contend is binding on this court and overrules the authority of the case of *Trustees of the Internal Improvement fund vs. William Bailey*, 10 Fla. R., 112, 125.

It is evident that an appeal could have been taken from the decisions of the Supreme Court of Florida in the said case of *Bailey* to the Supreme Court of the United States, as that case involved the construction of an act of Congress, and that the decision of the said Supreme Court of the United States, if an appeal had been taken, would have been binding upon this court and upon the parties to the suit.

Therefore we hold that by the case in 4 Wallace above quoted, it has been adjudicated that the said act of Congress of September 28, 1850, formed a contract between the State of Florida and the United States, and that this contract was binding upon the State and could not be vitiated by its legislation without infringement of the constitution, and

that the contract required the State to appropriate the lands granted, and further, that in the language of the Supreme Court of the United States, "the lands themselves might be conveyed to the levee contractor for work performed, or the contractor might be paid in money or scrip representing land."

II. That the State of Florida, by said statute of 1855, recognized the contract aforesaid, and provided the machinery for the execution of said contract and for the reclamation of the swamp and overflowed lands, and made it mandatory upon said trustees to provide for the drainage of the same.

It is contended that the State of Florida in the 16th Section of the said act of 1855, in the following words, "and make such arrangements for the drainage of the swamp or overflowed lands as in their judgment may be most advantageous to the Internal Improvement Fund, and the settlement and cultivation of the land," thereby applied by legislation the whole of the swamp or overflowed lands and their proceeds to the purpose of reclaiming them, and that it was and is the duty of the trustees to provide for their drainage by making such arrangements therefor as in their judgment may be most advantageous to the fund.

2. That any other application by the trustees of said swamp and overflowed lands and their proceeds than to the aforesaid purpose of drainage, is in direct violation of said act of Congress of 1850 and of the statute of the State of 1855, and a direct and palpable violation of their duties as such trustees, and especially of the duty imposed on them by said 16th section of said statute.

3. That all these lands, called the swamp and overflowed lands, became the property of the State by virtue of said act of Congress of 1850, and without any further act or thing required or remaining to be done by any officer or department of the United States. This view of the rights of the State is sustained by the Supreme Court of the United

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States in the case of Railroad Company vs. Smith, 9 Wallace, 99. In that case it was contended that because the Secretary of the Interior had not furnished the State with the lists of the swamp and overflowed lands within the State, no title had passed to the State, but Mr. Justice Miller, delivering the opinion of the court, said, "by the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain the fact and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the State might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay.

4. It appears by the pleadings in this suit that there now remains of said swamp lands about fourteen millions of acres unsold, which vast domain derived by said act of Congress and by the statute of 1855, we contend, the trustees now hold for the exclusive purpose of reclaiming them by drainage, for which purpose the State of Florida prescribed the duties and vested ample power in said trustees.

III. That the contracts made by the trustees with Gleason for the drainage of the swamp lands were in the power and discretion of the trustees and in accordance with the true intent and meaning of the statute of 1855, and the duties imposed on the trustees by the said 16th section of the statute which created the trust.

It is too plain for argument, that if the said contracts were valid, the present Board of Trustees cannot, without violation of the said statute and of the Constitution of the United States, impair the obligation of the contracts.

It is not denied that these contracts were made and executed by and between the contracting parties, the trustees on the one part and Gleason on the other.

It is further admitted, that in accordance with the provisions of said contract, Gleason dug a canal in T. 42, R. 43 east, which was 300 feet long, 200 feet wide and five feet average depth; and thereby connecting Lake Worth with the Atlantic Ocean, and reclaimed about 4,000 acres of the swamp or overflowed lands in the vicinity of the lake and canal. That under this contract he was entitled to receive deeds for six sections of land on paying the trustees two hundred and forty dollars. That he made the demand and tendered payment, but was refused by the trustees, who declared the said contracts null and void; because the defendants say they are "now advised that (they) have no power to appropriate any of the lands belonging to the Internal Improvement Fund for the purpose of drainage, or for any other purpose except for the prosecution of the works of internal improvement specially designated in an act to encourage a liberal system of internal improvements in the State, approved A. D. 1855, or to pay obligations already contracted in behalf of said improvements, and that the said contracts are null and void."

The defendants, it is supposed, predicated their action on the opinion in the Bailey case in 10 Florida. But we respectfully say that the said opinion has never received the sanction of the State of Florida, but, upon the contrary, we find that a statute was passed by the Legislature of Florida instructing the Attorney-General of the State "to file an application before the Supreme Court for a re-hearing in the case of the Trustees of the Internal Improvement Fund vs. William Bailey before a competent tribunal or by bill or otherwise to be filed by him, shall come before a competent tribunal to have the question in the above case settled and the questions arising out of this act in regard to the Indian River Canal." See Laws of Florida, 8th section, act approved December 10, 1862, chapter 1359, 35. By reference to the case of the Trustees vs. Bailey, 10 Fla., 214, it will be perceived that the Attorney-General did make said

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application and was refused, the court deciding that the judges who sat in said case were competent to hear and determine said case, and at pages 247 to 258 will be found the opinion of the court dismissing the application upon the ground that the said section of said act of 1862 was unconstitutional.

Thus we perceive that this case of Bailey was attempted to be opened and re-heard, and so dissatisfied was the State with the decision therein that a statute was passed for that purpose, and the law officer of the government instituted proceedings therefor, which were refused by the court who had made the decision; the same judges deciding as to their own eligibility, and the constitutionality of the statute which expressed the dissatisfaction of the law-making power with the decision rendered in that case, whereby this vast public domain was wrested from the objects to which it was granted by Congress and by the statute of 1855, vested in the trustees, to wit: reclamation and drainage, and attempted by that decision to be applied exclusively to aid in the construction of certain lines of railway.

But it is respectfully contended that the Legislature of Florida did not vest the lands derived from these two grants in said trustees to be applied exclusively to the construction of the lines of railway designated in the 4th section of the statute; the last clause of said section uses the following words: "are proper improvements *to be aided* from the Internal Improvement Fund in manner as hereinafter provided." If the construction given by the trustees to this statute was the correct one, such would not have been the language of the Legislature as quoted above; but the statute would have read, shall be first constructed before the Internal Improvement Fund or any part thereof shall be applied to any other object of drainage, or otherwise in the act provided for.

But instead of this being the language of the act, the Legislature declared a particular line of railways, and then

declared that they "are proper improvements to be aided from the Internal Improvement Fund," while the trustees, following the authority in the case of Bailey, say that they are the *exclusive* improvements, for whose construction and benefit the whole Internal Improvement Fund was created. Such a construction we hold cannot be gathered from the true intent and meaning of this statute, more especially as the 16th section in peremptory language declares that the Trustees *shall* make such arrangements for the drainage of the swamp or overflowed lands, as, in their judgment, may be most advantageous to the Internal Improvement Fund; nor will any court give a construction to a statute which will declare the same to be unconstitutional if the statute is capable of being otherwise interpreted, and it is evident that the Legislature, in the 16th section, provided the means through a Board of Trustees for the reclamation of those lands by drainage, in accordance with the contract between the State and the United States, as by the Supreme Court of the United States in the case of 4th Wallace, is laid down to be the true interpretation of the act of Congress of 1850.

Again, we contend that this statute of 1855 will be found to contain the following objects for which this fund should be used by the trustees: first, the statute said that a line of railway; and second, a particular canal described in the 4th section, were proper improvements to be aided from the fund; third, that the swamp and overflowed lands should be used for drainage of the same for the purpose of their settlement and cultivation; fourth, for the encouragement of actual settlement and cultivation of said lands, and to accomplish this last purpose the trustees were authorized to prescribe rules and regulations, having reference to pre-emptions, granting a portion of said lands therefor, limited, however, to not more than one section of land to any one settler, and we hold that while the first two objects of the statute were confined to the five hundred thousand acres,

the balance of the fund, to wit: all the swamp or overflowed lands, were to be applied by the Trustees as in the 16th section is provided, to the other two objects, the primary object being that of drainage.

But as to the five hundred thousand acres, these lands were derived from an act entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4, 1841. The 8th section said, "and be it further enacted, that there shall be granted to each State specified in the 1st section of this act, five hundred thousand acres of land for the purposes of internal improvement;" then follows the proviso relative to the grant to these States, and then, at the end of the section, we find the clause or language by which the State of Florida obtained the aforesaid five hundred thousand acres mentioned in the bill, which part of said section 8 is in the following words:

"And there shall be, and hereby is, granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a Territorial Government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Congress providing in the 9th section that these lands should not be sold for less than \$1.25 per acre, and provided that the net proceeds of the sale of said lands should be faithfully applied to objects of internal improvement within the State, and in said section designated such objects, to wit: roads, railways, bridges, canals and improvements of water-courses and drainage of swamps, and further provided that when they were made or improved they should be free for the transportation of the United States mail and munitions of war, and for the passage of their troops without the

payment of any toll whatever, which section will be found at page 445, volume 5 U. S. Statutes at Large, as follows :

"SEC. 9. *And be it further enacted*, That the lands herein granted to the States above named shall not be disposed of at a price less than one dollar and twenty-five cents per acre, until otherwise authorized by a law of the United States ; and the net proceeds of the sales of said lands shall be faithfully applied to objects of internal improvement within the States aforesaid, respectively, namely: Roads, railways, bridges, canals and improvement of water-courses, and draining of swamps ; and such roads, railways, canals, bridges and water-courses, when made or improved, shall be free for the transportation of the United States mail and munitions of war, and for the passage of their troops, without the payment of any toll whatever."

It is apparent that as to the lands granted to the State of Florida under this act of Congress of 1841, the State had full power to apply the net proceeds of the sales of said five hundred thousand acres to the construction of the lines of railway and the canal designated in the act of 1855, but as before shown, the swamp or overflowed lands were not granted to the State until nine years thereafter, and that for a different purpose and sole object, to wit: reclaiming them, and we hold that there would be just as much power in the State of Florida to apply the Seminary and School lands granted to the State by the act of March 3, 1845, or any of the following lands, which were by said act of Congress, granted to the State as we find in the first section of said act, to wit: eight sections for the seat of government, the 16th section in every township for the support of public schools ; also two additional townships for seminaries of learning, and five per cent. of the public lands within the State for the purpose of education. See page 788, volume 5, U. S. Statutes at Large, Sec. 1, Act March 3, 1845, to the purpose of constructing railroads or canals, or to attempt to divert the swamp or overflowed land from the purpose of the

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drainage to the construction of lines of railway, unless it can be made to appear to the satisfaction of this court that railroads are constructed for the purpose of drainage of overflowed lands instead of for the carrying of freight and passengers, and that the line of railway designated in the 4th section of the act of 1855 was to be constructed for the purpose of draining the swamp and overflowed land granted in 1850 to the State of Florida by the Congress of the United States for the purpose "of reclaiming them."

The Supreme Court of the United States, charged by the Constitution with the interpretation of acts of Congress, having decided that said act of 1850 constituted a contract between the State accepting the act and the United States, we deem it unnecessary to cite further authority to show what said act of Congress is, or to attempt to interpret it, for it is too well established to admit of denial that when propositions are offered by one State and agreed to and accepted by another, they constitute a compact between them.

IV. That even if the foregoing positions are wrong, yet, nevertheless, the present trustees ought, in good faith, to carry out on their part the contracts set forth in the bill made with Gleason by their predecessors.

Because it appears from the pleadings that while there had been issued \$3,502,860 of railroad bonds under the act of 1855, for the *interest* on which the fund was liable, yet there now remains outstanding but the sum of \$696,000 of bonds, for the interest on which last sum the fund is now only liable, the balance having been redeemed or cancelled; and we hold it were a strange interpretation to give to this statute that the drainage of the swamp or overflowed land, and all other work of internal improvement, should fail to receive any assistance by this act, or the fund by it provided, until the last coupon of the last bond issued under said act had been paid; yet such is the construction given by the trustees to this statute by the resolution passed by

them, which declares that the contracts of their predecessors made with Gleason are nullities.

V. The pleadings further show that, unless restrained by the decretal order prayed for in the bill, they will dispose of the lands designated in the contract to the utter annihilation of the rights of Gleason.

And we hold that, although the defendants are public functionaries who are exercising a public trust, a court of equity will interfere where they are departing from the power which the law vested in them, and that the court will treat them merely as persons dealing with property without legal authority. 2 Story, Eq. Juris., Sec. 955. And that court of equity will interfere by injunction to prevent the sales of real estate, as to restraining the vendor from selling, to the prejudice of the vendee, pending a bill for the specific performance of a contract respecting an estate. 2 Story, Eq. Juris., Sec. 953; 16 Ves., 267.

In this case the power of specific performance is within the scope of the duties of the trustees; the discretion vested in them by the act has been performed by their predecessors. They do not deny the reasonableness of the contract, the benefit to the fund to be derived therefrom, nor that Gleason has performed the contract on his part; but, upon the contrary, the same is admitted, and the defendants undertake to declare the said contracts void upon an interpretation which they are advised the statute warrants them in so doing; and we submit that, in such a case as here presented, a court of equity will grant the relief prayed for in complainant's bill, and that the decree of the Chancellor of the Fourth Circuit should be affirmed.

WESTCOTT, J., delivered the opinion of the court.

The appellants have alleged that the contract set up in the bill is illegal and void, is beyond their power as trustees, and that a court of equity will not decree performance upon their part. A trustee, who comes into a court of

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equity alleging want of power and illegality in his contracts in reference to the trust committed to his care, and who asks a court, for this reason, to deny relief to a party who alleges performance upon his part, occupies a position which cannot be commended. The trustee, however, is yet to be heard from, and his answer may explain all the circumstances. In such a case the specific performance might perhaps be denied, in the interests and in behalf of the *cestuis que trust*, and the party left to such a remedy against the property of the trustees as the laws afforded him, if any.

But is it true that the contract here is *ultra vires*, as to the trustees? Under the provisions of the act of January 6, 1855, all the swamp and overflowed lands granted to this State by the Federal Government, and the proceeds to be realized from sales thereof, were, with what is known as the internal improvement lands, set apart and declared a distinct and separate fund, called the Internal Improvement Fund.

These lands were vested in five trustees. The duties of the trustees as to the management and investment of the trust fund were prescribed, and certain improvements were designated as proper to be aided from the fund, and the manner of extending such aid was indicated in the act. In regulating the manner in which this trust estate should be administered, and directing the means through which the land was to be made useful to the fund, the law requires that the price of the saleable lands should be fixed with reference to their location and value, and that, as to the swamp and overflowed lands, they should make such arrangements for their drainage as, in their judgment, was most advantageous to the Internal Improvement Fund, and the settlement and cultivation of the land. These swamp lands, therefore, are a trust estate, and it is the duty of the trustees, under this act, to improve the trust property by drainage. The error of the defence here made by the trustees is the conception that a contract to improve the trust

estate, by using a portion of it to render the balance more valuable, in a manner authorized by the act—in other words, using a portion of the fund, or a part of the land itself, to make the other of more advantage—is a violation of the trust. The construction contended for would render these trustees powerless to drain one acre of the millions of acres of swamp lands now in their hands, thus preventing their improvement, and would prevent them from carrying out the manifest policy and spirit of the law upon the subject. As a matter of course, the interest of the *cestuis que trust* are not to be disregarded in this matter, nor is the simple *element of drainage* in a contract enough to secure its approval and enforcement by a court of equity. The performance of this contract involves, so far as appears from the face of the bill, no diversion of the trust fund. It is its simple improvement in a manner authorized by the law of the trust. As the case now stands, we must presume that the contract is advantageous to the fund. Our attention has been called to the case of *Bailey vs. The Trustees*, 10 Fla., p. 112, and it has been contended that the matter there decided covers this case. This, we think, is incorrect. In that case the trustees sought to appropriate the fund to deepening the channel of a river. That is the case stated by the Justice delivering the opinion. The deepening of the channel of this river was nowhere declared to be a proper improvement to be aided by the fund, and the court enjoined such a use of the fund.

In this case the court should not proceed further without requiring the *cestuis que trust* to be made parties. Where trustees enter into contract in their character as trustees, and in behalf of the trust estate, and for the benefit of the *cestuis que trust*, the *cestuis que trust* for whose benefit the contract was made ought to be parties to the suit. (*Perry on Trusts*, § 874; *Story's Eq. Plds.*, § 208.)

There are perhaps exceptions to this rule, as originally announced by Sir John Leach, but we think the presence

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of the *cestuis que trust* here is advisable and necessary. The trustee here apparently assumes an attitude hostile to the *cestuis que trust*, and it is best that they should be heard as to their rights.

The judgment upon the demurrer is affirmed, and the case is remanded for further proceedings not inconsistent with this opinion and conformable to law.



LEWIS KAHN, RESPONDENT, VS. MOSES KAHN AND JOSEPH
DOLL, APPELLANTS.

1. Both legal and equitable relief may be blended in the same action under the Code. Where the primary relief sought is legal, a case must be made in which the plaintiff is entitled to the final relief prayed, in order to authorize a temporary injunction under the Code in aid of such relief. Such an injunction should not be granted to restrain the doing of acts in relation to property, in respect to which property no final judgment is prayed.
2. Where an inferior court, after appeal and proper measures to secure a stay of proceedings, continues to proceed, the proper remedy is an appeal to the exercise of the power of the appellate court, and not by an injunction from a court of equity.
3. Where an appeal is taken from an injunctive order in an action of trespass, this court will examine such order. It cannot examine interlocutory orders in the action of trespass, as an appeal lies only to the final judgment of the court therein.

Appeal from the Circuit Court of Escambia county, First Judicial Circuit.

This is an action under the Code brought by Lewis Kahn against Moses Kahn and Joseph Doll. The complaint alleges that Moses Kahn recovered a judgment against the plaintiff in a justice's court for thirty dollars and costs that plaintiff prayed for and obtained an appeal to the

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y Court of Escambia county, and has given the un-
ing to obtain such appeal and to obtain a stay of ex-
1; that defendant, Moses Kahn, and Joseph Doll, who
onstable for Escambia county, disregarding said ap-
nd said undertakings, has proceeded to levy said exe-
, and has taken possession of a portion of the goods
attels of the said plaintiff; that the said plaintiff has
l to replevy said goods, and has offered a replevy
o the said constable as required by law, and that said
ble has refused to receive said bond, and that he has
lamaged and injured to the extent of three hundred
s. He prays judgment for three hundred dollars
ges against the defendants, and an injunction re-
ing them from further proceedings, under said judg-
and execution, until the determination of said appeal
ntil the further order of the court.

: injunction, as prayed for, was granted. As to the
proceedings in the action of trespass, it is unnecessary
ition them further than to say there has been no final
ent in the action. An appeal is now prosecuted to
ourt.

Dennis Wolfe and C. W. Jones for Appellants.

C. and J. E. Yonge for Respondents.

ESTCOTT, J., delivered the opinion of the court.

ile we do not propose to say this is a good declara-
et, so far as a cause of action is disclosed, it is tres-
or an alleged illegal taking of personal property. To
xtent a legal wrong is alleged, and legal relief is
l; judgment sounding in damages is asked. No lien
ght to be enforced, no recovery of a specific chattel is
d, no primary equitable relief as to the goods is sought.
njunction prayed for is to stay proceedings—in other
, to stop the sale. Here, then, we have a compound
r for judgment embracing both legal and equitable

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relief. This is authorized by the Code, and the injunction here issued, if authorized at all, is sanctioned by Section 168 of the Code. Such an injunction as is here prayed should only be granted where it appears by the complaint that the plaintiff is entitled to the final relief demanded. (Voor. Code, 316, 314, a.) Here, upon the face of the complaint, the Circuit Court has no jurisdiction, as the sum demanded is not over three hundred dollars. Nor should an injunction be granted under this section to restrain the doing of acts in relation to property in respect to which or property no final judgment is prayed. (Voor. Code 316, a.) Here the final judgment prayed is for damages for a past trespass.

Independent of these considerations, too, an injunction should not be made to supply the place of a prohibition or supersedeas, or whatever may be the proper writ which an appellate court should issue to restrain proceedings in an inferior court.

If the appellants here have complied with the requirements of the law, so as to vest jurisdiction in the appellate tribunal, and is entitled to a stay of proceedings, then the appellate court, as an incident to its primary appellate jurisdiction, can control the action of the inferior court. The remedy is not by injunction. The county court has jurisdiction to issue all writs necessary to maintain its jurisdiction or to enforce its authority. (Sec. 3, Chap. 1627, of Laws of Florida.) The order granting an injunction in this case was wrong, and must be reversed.

This order of the Circuit Court is by statute the subject of appeal.

The orders of the court in the action of trespass are not subject for review upon appeal until after final judgment. There has been no final judgment here.

The order granting an injunction in this case is reversed, and the case is remanded for such proceedings as are conformable to law.

MICHAEL BOWES, ET AL., APPELLANTS, VS. HALSTED H.
HOEG, RESPONDENT.

1. To justify allowing an injunction where the affidavit to the bill is by counsel, it must be such an affidavit as does not leave it to the counsel to determine for himself what facts he swears to. Where such an affidavit is positive and direct to no material allegation in the bill, an injunction should not be granted.
2. A stockholder, having no claim upon particular funds of a corporation, cannot, as against the action of himself and the corporation, get an injunction upon a claim of property in himself in such funds.
3. Equity will not decree the return of a particular chattel, unless it is of peculiar value and character.
4. To an amended bill the defendant has a right to interpose a new demurrer, notwithstanding a previous demurrer to the original bill has been overruled.

Appeal from the Circuit Court of the Fourth Judicial Circuit, Duval county.

The bill in this case was filed in February, 1875, by H. H. Hoeg. It alleges substantially that the complainant, with John S. Sammis, Otis L. Keene, Michael Bowes, John Clark and A. M. Reed, in January, 1874, associated themselves together and became incorporated as a company under the act of August 8, 1868, as the Jacksonville Gas Light Company, of Jacksonville; that the gas works proposed to be operated by this company had been constructed in 1860, and that plaintiff, Hoeg, was the principal contributor to its construction, having expended eleven or twelve thousand dollars to start the business; and that this original association was incorporated in 1860. That the capital stock of the Jacksonville Gas Light Company, incorporated in January, 1874, consisted of one hundred and eighty-seven (187) shares, and that plaintiff is interested in such stock as follows: seventy-four shares of stock standing in his own name, twenty-five standing in the name of his wife, and five shares in the name of the estate of D. L. Palmer, deceased, plaintiff being his administrator. That there was one share

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in the name of M. Bowes, and one share in the name of Miles Price, which said shares were placed in their names by plaintiff to make them stockholders, in order that they might become directors of said company. That plaintiff was the lessee of said works for the year 1874; that for the year 1875 John S. Sammis was elected president of said company, plaintiff secretary and treasurer, and Miles Price, Michael Bowes, Otis L. Keene, John S. Sammis, and plaintiff, were elected directors. That on the 31st day of December, A. D. 1874, it was resolved, at a directors' meeting, "that the president and secretary of the company be authorized to run the works on account of the company, and employ such officers and employees as may be necessary in the management of the same, until the further action of the directors," the minutes of the meeting being signed by John S. Sammis, president, and by plaintiff as secretary. That on the 30th day of January, A. D. 1875, in the absence of plaintiff, the said directors held a meeting in the city of Jacksonville, and, without a majority of the stock being represented, and with three directors present—Sammis, Keene and Bowes—a proposition was entertained from Bowes to lease the gas works from the 1st day of January, A. D. 1875, to the 1st day of January, A. D. 1876, at two hundred and fifty dollars, and said proposition was accepted, Bowes being required to give satisfactory bonds for the faithful performance of his contract; that the minutes of said meeting were signed by Sammis as president, and by Keene as *secretary pro tem.*; that a bond was given by Bowes, Keene and Sammis, and approved by Bowes, Keene and Sammis, directors. That the meeting at which this proposition was submitted was held January 30th, and the bond purported to have been executed on the 1st of January, and approved February 1st. That said Bowes, under this contract, has collected large amounts of the gas bills for the month of January, 1875. That after the 31st December, 1874, the gas works were carried on by plaintiff;

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that, in order to do so, he purchased upon his individual account a large amount of material, and this material he is informed is now being used and consumed by said Bowes in running the gas works under his contract; that said Bowes is "not pecuniarily responsible," and that plaintiff will suffer irreparable injury if said Bowes is permitted to use said material, and that plaintiff "ran the gas business for the month of January, 1875, at his own expense." Omitting deductions and conclusions, these are substantially the facts alleged in the bill.

Plaintiff prayed an injunction restraining Bowes, Sammis and Keene from interfering with the material, his individual property, from collecting bills due for gas for the month of January, 1875; for an order in the nature of a *mandamus* to pay over to him all moneys collected on the bills for January, 1875; that the lease of Bowes would be decreed to be void; that the works may be placed in the hands of a receiver; that a dissolution of the corporation be decreed, and a full settlement of its affairs be had. The verification of the bill is set out in the opinion, and it is not deemed necessary to insert it here.

The bill is marked filed the 13th of February, 1875. On the 11th of February, 1875, the Judge granted an injunction restraining the defendants from collecting the gas bills of January, 1875, enjoining the use of the material alleged to be the property of the plaintiff, enjoining Bowes from parting with any money collected by him on the January bills, requiring Bowes to give bond to pay said bills already collected to plaintiff, if so directed by the court. This order was made after notice. On the 18th of February defendants filed a general demurrer to the bill. On the same day complainant filed a notice of motion to be made on March rule day for the appointment of a receiver, cancellation of the lease, and other relief prayed in the bill. At the same time "notice of setting down defendants' demurrer on March rule day was given." The demurrer was

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heard at that time, and was overruled. The court then granted leave to complainant to amend his bill "by adding new parties and affidavit of complaint."

On the 13th of March the complainant filed an amended bill, which is the same as the original bill, except that the prayer for receiver and dissolution and settlement of the affairs of the company is omitted, and the bill is verified by complainant instead of his counsel. On the same day complainant filed notice of motion to be made for an order to set down the time for filing an answer. Upon the hearing of this motion, on the 8th of March, the court ordered the defendants to file their answer to the bill within five days from date. On the 13th of March the clerk of the court, at the direction of the complainant, entered an order taking the bill for confessed. On the same day the defendants filed a demurrer to the amended complaint, setting up as cause of demurrer want of equity in the bill; that all the stockholders were not made parties; that there is full and adequate remedy for the alleged wrong by calling a meeting of the stockholders under the charter; that the remedy of the complainant is against the company, and not against the directors; that his remedy to recover the personal property is at law. Other grounds were taken, but it is unnecessary to mention them, as they are matters of argument rather than propositions of law arising upon the facts stated in the bill.

On the 15th of March the complainant filed a notice of motion to strike the demurrer from the files, and for a final decree upon the order taking the bill for confessed. On the 17th of April it was ordered that the second demurrer be stricken from the files, and that final decree be not granted.

On the 20th of April the defendants enter their appeal from all of these orders made during the progress of the cause to this court.

Fleming & Daniel and *Ives & Dawkins* for Appellants.

Cooper & Ledwith for Appellee.

WESTCOTT, J., delivered the opinion of the court.

The first order made in this cause, and which the appeal brings to our attention, is the order granting an injunction. The objection that the bill was not properly verified to entitle complainant to an injunction was well taken. The affidavit upon which the injunction is based was made by plaintiff's counsel, and is as follows:

"STATE OF FLORIDA, DUVAL COUNTY.—Personally appeared Charles P. Cooper, one of the complainant's solicitors to the foregoing bill of complaint, who, being duly sworn, deposes and says: That the statements made in the said bill, as far as the same are disclosed by the minutes and records of said gas light company, and in so far as the same have come otherwise *directly* to deponent's knowledge, he knows to be true, and all else he believes to be true."

This affidavit is positive and direct as to no single material fact. The truth of what is sworn to by the counsel is placed upon two conditions: that it should appear by the records and minutes of the corporation, and that the facts must have come *directly* to his knowledge. What the records and minutes show, according to his view of the case, is nowhere disclosed; and that a single fact has come *directly* to his knowledge, is nowhere alleged or shown. Such a verification is not sufficient to justify the court in granting an injunction. (9 Paige, 304, 306; 7 Paige, 157.)

It cannot be said, from anything that here appears, that the party making affidavit claims to have any personal knowledge of a single material fact alleged in this connection.

Independent of this technical objection, there is no equity in the bill, so far as it seeks the recovery of specific personal

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property of Bowes; nor is there any equity, as against Bowes, in the matter of the bills due for January, 1875.

Equity will not decree the return of a particular chattel, unless it is of peculiar value and character. The remedy is at law. As to the bills due for gas furnished in January, and which it is alleged that Bowes is collecting under an agreement with the company, the bill itself alleges that the directors, with the assent of the plaintiff, on the 31st December, 1874, ordered that the president and secretary of the company be authorized to run the works *on account of the company*, until the further action of the directors, and no further action of the directors upon the subject is alleged until the 30th of January, 1875, when the lease was made to Bowes. It is unnecessary for us to say anything as to the validity of this lease. That a majority of a quorum of the directory could give him authority to collect the bills for the company, we have no doubt. The bills during the month of January appear to belong to the company, and if the works were run by the plaintiff, as he alleges, he must have run them as the agent of the company. This is the only reasonable construction and effect to be given to these allegations of the bill. His lease and individual control, even granting the power of this corporation to execute a lease, ended with the year 1874. Such an order could be made at the suit of the company, or at the suit of a stockholder, showing a proper case for injunction against the corporation and Bowes, but not at the suit of a stockholder claiming the fund as his own against the corporation to whom it belongs.

Upon the face of the bill there are not facts alleged justifying an injunction, and neither what is called the mandatory order, or the injunction, or the order requiring at the hands of Bowes bond for moneys collected, are proper. After the order granting the injunction was passed, the defendants, before the next rule day, (the time at which they were required to file a demurrer, answer, or plea,) filed a

general demurrer to the bill, and upon the same day the plaintiff entered an order setting down the demurrer to be argued on the next rule day. The demurrer was heard and overruled. Upon overruling the demurrer, in the absence of any order, the defendant must have answered the bill by the next rule day, or the court could have required, in its discretion, an answer to be filed at an earlier day. (Rule 51, Equity Practice.) No such order, however, was made, but, instead thereof, on the same day leave was granted plaintiff to amend his bill "by adding parties thereto, and adding affidavit of complainant." On the 13th of March the plaintiff filed an amended complaint. No new parties were made, and the only difference in the amended and original bill was that the amended bill was verified by the plaintiff, and so much of the prayer of the original bill as asked for a receiver and dissolution of the corporation was omitted.

Upon motion, the defendants were ordered to file their answer to this amended pleading within five days. Before the expiration of five days the defendants filed a demurrer, and before the expiration of the five days the plaintiff entered an order taking the bill as confessed. The demurrer is stricken from the files. The technical construction of the word "answer" in this connection is immaterial. The court should not, upon the filing of the amended bill, limit the right to filing an answer as distinct from a demurrer.

Upon the amendment of the bill, defendants had a right to interpose a new demurrer. The authorities upon this question go to the extent of saying that "the circumstance of the amendment being of the most trifling extent, will not, it seems, make any difference." (4 Sim., 573; 2 Bro., C. C., 66; 2 Dick., 672; 1 Smith's Chan. Prac., 2 Am. ed., 214; 1 Hoff. Chan. Prac., 216; 9 Porter, 697; 10 Geo., 113.)

The judgment of this court is:

That the injunction and mandatory orders granted in this cause on the 11th day of February, the order of the 8th of

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March, requiring defendants to file their answer to the bill of complaint in five days, the order taking the bill for confessed, and the order striking the second demurrer from the files, are reversed and set aside, and the case is remanded to the court below, where it will stand for hearing upon the second demurrer.

JOSEPH GILMER, APPELLANT, VS. WILLIAM C. BIRD, RESPONDENT.

1. It is within the power of the Legislature to authorize notice of the institution of a suit to be given by an attorney or party, instead of through a writ issuing out of a court.
2. The summons authorized by the Code is not process within the meaning of that clause of the Constitution which requires that "the style of all process shall be 'the State of Florida.'"

Appeal from the Circuit Court for Jefferson county, Second Judicial District.

Joseph Gilmer, the appellant here, the plaintiff in the Circuit Court sued William C. Bird in the Circuit Court of the Second Judicial Circuit, Jefferson county. The action was under the Code. The summons conformed in all respects to the requirements of the Code, and a copy thereof, with copy of the complaint, was served upon the defendant.

Upon default of the defendant a judgment was entered by the clerk against him on the 28th of April, A. D. 1873.

On the 12th of December, A. D. 1873, a motion to open this judgment was made on the following grounds:

1. Because there was no process served on the defendant requiring him to answer the complaint in the action, and the defendant did not appear by attorney or otherwise.
2. Because the pretended process or summons served on the defendant in this action had no style of process, to wit:

"The State of Florida," as required by the Constitution and laws of this State.

This motion was granted, and it was "considered by the court that the judgment entered in this case is void for the reasons assigned," and it was ordered "that the same be set aside and vacated."

To this ruling an exception was taken, and upon this appeal its correctness is presented for the consideration of this court.

R. B. Whitfield and S. Pasco for Appellant.

There is only one ground upon which the action of the court can be sustained, and that is that the judgment was void; an absolute nullity. Was it void? The defendant rests his case upon the Constitution. "The style of all process shall be 'The State of Florida.'" (Art. 6, Sec. 2.) And to show that no one can be sued without process, it further adds: "No person shall be deprived of life, liberty or property without due process of law." Declaration of rights, Sec. 8. It is owing to an entire misconception of the latter clause that the court has been lead into error. It is urged that the phrase simply means, in accordance with the law of the land or by due course of law, that it has no reference to the form of the summons, but to the entire proceedings in a cause, and requires that they shall conform to some fixed rule of law. 1 Bouvier's Law Dict., 12, Art. "Due Process of Law;" Cooley's Const. Lim., Chap. 11, 353-6; Sedgwick on Stat. and Con. Law., 474, 481, 574, 577. The Constitution does not prescribe the form of writs or require a defendant to be brought into court by service of process upon him, but authorizes the Legislative Department to regulate and direct the whole course of the judicial proceedings; and if it is here shown that the action was conducted in conformity to the law governing such cases, it is maintained that the judgment was not a nullity. 2 Am. Law Times, 37, Jan., 1875.

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The summons in this action conformed to every requirement of the statute, (Code, title 5, p. 28, Sec. 79,) and unless that is unconstitutional, the judgment must stand. The summons was regularly served, and if it was defective, it is well settled that mere defects in obtaining jurisdiction will not render a judgment void, every presumption is in favor of the jurisdiction, and the court, through its clerk, passed its judgment upon the summons, and the judgment thus rendered is as valid as if pronounced by the court. Freeman on Judg., § 124-6; 2 Wallace, 341; Freeman, 126, note; 4 Minn., 473; Code, § 124. The defendant had his day in court and could have pleaded these alleged irregularities before judgment or within one year after its rendition, or he could have appealed within the proper time from the judgment, but with notice of the institution of the action he allowed it to go on without objection, and after the full period had elapsed for him to meet it in the usual way, he brings these proceedings, based upon the ground that the judgment is a mere nullity. Although there can be no waiver of jurisdiction in regard to the subject matter, the case can be of the person, (10 Peters, 450; Freeman on Judg., § 102, 119.) and it is urged that the defendant has waived all defects by his acts which are set forth in the testimony which was taken without objection and was not contradicted, and that estopped him from moving to open or set aside the judgment. Cooley's Con. Lim., 398; 20 Wis., 270. The whole matter of jurisdiction and the different senses in which the word void is used, are presented at length by J. Bell in a New Hampshire case, 6 Foster, 232. The defect in a writ is there held to be such a defect as the party waives by delay, and it is held that a defendant will be forever precluded to make the objection afterwards. The summons is not process, and under the Code a defect in it will not vitiate a judgment. If defective under the practice will be considered as amended. 2 Bouv. L. D., 379;

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Wis., 70; 3 Black., 279; 12 Minn., 80; Code, § 126-3: 1 Fla., 383; 6 ib., 724; 8 ib., 29.

There are similar requirements as to style of process in the organic law of other States, and similar questions have been raised by motion to quash the writ by plea or otherwise, and though now and then a precedent may be found for the decision of the court below in this case, such cases are against the whole current of authority, and have frequently been overruled by later decisions in the same courts. Many of these cases have been settled by the subsequent appearance of the parties, but in selecting the cases to be cited care has been taken to choose those where the decision was made without reference to such subsequent appearance. These cases, it is believed, support this proposition of law. 13 Met., 478; 2 Pick., 592; General Stat. N. H., 32, Art. 87 of Const.; 19 N. H. 394; 32 ib., 87; Revised Stat. Wis., 39; 10 Wis., 95, 100; 11 ib., 70; 12 Mich., 216; 7 Eng., 537; Stat. Minn., 26, 35, Cons. Dec. Rights, and Art. 6, § 14; 12 Minn., 83; 12 ib., 255, 264; Compiled Laws of Mich., 65, Const., Art. 6, Sec. 35; 4 Mich., 579; 7 Mo., 163-5; 35 ib., 196; 4 Blackford, 140; 4 Green, (Iowa,) 42; 29 Md., 377; 12 Kan., 420.

If the omission from a summons of any formal particular required by the Constitution of the State is an error or defect, such error is not fatal, and the summons may be amended upon motion before judgment, and if an action proceeds to judgment without objection to the writ, the judgment will be sustained. Breese (Ill.,) 133; 7 Cal., 54, 64; 33 ib., 682; 5 Gilman, (Ill.,) 459.

In the case at bar no injury or injustice is done the defendant by sustaining the judgment; he does not deny the debt; he has admitted the validity of the judgment for years, and has sworn to its existence, and only comes forward to attack it when other and later judgments and other liens have encumbered his property so that a new judgment upon the same cause of action would be worthless if suit

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had been brought anew upon the action of the court below and now no action can be brought because the statute limitations bars the note sued upon, so that the sustaining of the judgment appealed from can only work injustice and wrong upon the plaintiff, and deprive him of what is just to him, to the benefit, not of the defendant, but of subsequent incumbrancers. 13 Fla., 278.

Under such circumstances the courts act always with extreme reluctance in disturbing judgments. Freeman Judgments, § 108.

Papy & Raney for Respondent.

The first and most important question for the consideration of the court is, whether a judgment for want of answer, taken in the clerk's office under the provisions of the Code of Procedure, without an appearance upon the part of the defendant, is of any validity when the summons in the action was without the style of process prescribed by the Constitution of 1868. We respectfully submit that it is without validity.

The language of Sec. 2, Art. VI., is: "The style of process shall be the State of Florida, and all prosecutions shall be conducted in the name of and by the authority of the same." Acts of 1868, p. 203.

The argument, we think, resolves itself into three questions:

1. What did the makers of the Constitution mean by the use of the word "process?"
2. Is the summons provided for by the Code within the meaning they intended to convey?
3. Is the provision prescribing a style process mandatory upon, or discretionary with, the courts? Is the style of process prescribed by the Constitution a mere matter to be dispensed with by the courts at their pleasure, or is it essential to all process?

I. To consider the first proposition, we must place our-

selves in the position of the framers of the Constitution to understand its meaning. They stood with the judicial system of the State of Florida, as provided by the common law, modified by the statutory system of the State then existing, before them. Sections 1, 2 and 3 of Article XV. show that system, whether growing out of legislation anterior to or pending the war, had come under their consideration and met their approval, except so far as any part of it was inconsistent with the Constitution of the United States, or that of the State. In the use of the word "process," then, they mean that anything in the course of a suit, from incipency to conclusion, whether a creature of the common or the statute law, which under that system was process, and anything which in the future might be originated in lieu thereof, or substituted for it, to effect the same purpose, was and should be considered process. The words of the Constitution are to be construed as used in their ordinary sense, and the ordinary sense of the term in the State of Florida, or under its judicial system, is the sense in which the word "process" is presumed to be used by them.

In the construction of a Constitution, words must be understood to have been used in their ordinary sense. Cooley's Const. Lim., m. p. 58, 59; Story on Constitution, 452, 453; 5 Ind., 557.

Assuming that the above is correct, let us inquire if the means of commencing a suit, or, as we say in the usual phraseology of the law, the means of bringing a party into court, was, at the time of the framing of the Constitution of 1868, process.

By section four, Act of 1828, Thompson's Digest, p. 325, which statute was continued in force by the Constitution of 1868, and had been in force since its adoption in 1828, it is provided that when any person wishes to commence an action in any of the courts, he shall have the right to sue out his process either against the person or the estate of the

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defendant; and when the same, i. e., the process, is intended to be sued out against the person of the defendant, it is provided that a *capias* or a summons *ad respondendum* shall be made out by the clerk, upon the filing of a *præcipe* by the plaintiff or his attorney. This section provides that this *capias* or summons shall be called the original.

It is the process, and section seven of the Act of November 29, 1829, p. 326 of Thompson's Digest, provided how all process shall be tested, etc., and particularly how a summons *ad respondendum* shall be made returnable, thus again recognizing it as process.

Section 15, Art. V., Constitution of 1838, provided that the style of all process shall be "The State of Florida." In Thompson's Digest of the Laws, this part of the section is printed with the statutory provisions, showing it to be the understanding of the codifier that the provision of the Constitution applied to such suits as process. In different sections of the above act of 1828, as will be seen on pages 326-7 of Thompson's Digest, this summons *ad respondendum* is spoken of as "original writ or summons," and "original process," and "process;" and, in the form of a subpoena, printed for the commencement of chancery cases, page 450 of Thompson's Digest, this "style" is used. In view of these facts, there seems to be no room to doubt that the summons *ad respondendum*, which was the means in use for bringing a party into court, or of commencing any action against him personally, when the present Constitution was formed, was embraced within the meaning of the word "process," in its ordinary acceptation as applicable to judicial proceedings; and we feel forced to conclude that, by the use of the term, the framers of the Constitution referred as much to the means of commencing a suit as to any writ issued at any stage of the same.

To commence a suit against a person or his property, by summons or attachment, one sued out his "process."

Again, we contend that if the framers of the Constitu-

tion were supposed, by the use of the term process, to have spoken solely with reference to the common law, (the usual resort for ascertaining the definition of terms,) that the writ, summons, or other agency which might be used for bringing a party into court, or commencing an action against a person, is within the term as used by them. If they spoke with reference to the common law, they meant the common law as it stood modified at the date as of which it was adopted by the State of Florida, and by the English statutes adopted with it. It is true, that in the early days of the common law, the first proceeding in commencing a suit in the court of common pleas was the original writ. This issued out of chancery, and was intended as much to give jurisdiction to the court as to notify the party of the commencement of the suit; it commanded him to satisfy the complaints, demands or appear in the court to which it was returnable.

In the King's Bench, also, the original writ was used; but Mr. Blackstone says the more usual method was by a peculiar species of process, entitled a bill of Middlesex, or, if the court set in Kent, a bill of Kent. This bill was a kind of *capias* requiring the sheriff to have the defendant at Westminster to answer the plaintiff of a plea of trespass, and was the fiction by which the jurisdiction of King's Bench was extended to civil causes generally.

In the days of Mr. Blackstone it was the usual practice, in the common pleas, to sue out a *capias*, in the first instance, upon a supposed return of the sheriff, and afterwards draw up a fictitious original writ, if the party was called upon to do so, with a proper return thereon, in order to give the proceedings a color of regularity. Book 3, m. p. 282. The same author, in speaking of process in the King's Bench, says: "But, as in the common pleas, the *testatum capias* may be sued out upon only a supposed and not an actual preceding '*capias*'; so in the King's Bench a *latitat* is usually sued out upon a supposed and not an actual

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bill of Middlesex; so that in fact a latitat may be called the first process in the Court of King's Bench, as the testatum capias is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common capias suffices. So in the King's Bench, likewise, if he lives in Middlesex the process must still be by bill of Middlesex only." Book 3, m. p. 286. In Tomlin's Law Dictionary, Title Process, it is said that the common mode of commencing actions in the Court of Common Pleas was by capias quam clausum fregit, founded on a supposed original answering to the bill of Middlesex or latitat of the King's Bench. Mr. Blackstone, on m. p. 287 of same book, again says, if the sheriff had found the defendant upon the capias or latitat, etc., he was anciently obliged to take him into custody and produce him in court upon the return; for he was considered in contempt for not having obeyed the original summons—meaning the notice served by the sheriff. But, says he, when the summons fell into disuse, and the capias became in fact the first process, it was thought wrong to imprison a man for a contempt which was only supposed; and therefore, in common cases, by the gradual indulgence of courts, (at length authorized by 12 Geo. I., 29, and amended by 5 Geo. II., and made perpetual by 21 Geo., II.,) the sheriff can now only serve the defendant with a copy of the writ or process, and with notice in writing to appear by his attorney in court to defend the action, which, in effect, reduces it to a mere summons. If the defendant appeared upon this notice, he put a common bail, John Doe and Richard Roe being his sureties; and if he did not, the plaintiff entered an appearance for him, filed the common bail in his name, and proceeded thereupon as if the defendant had done it himself.

This was the practice at this time, when the plaintiff did not require special bail and resort to imprisonment for debt. Book III., 587. And the result was not to compel the defendant to appear in court, as would be inferred from

Mr. Blackstone considering process as the means of compelling his appearance, but merely to lay the basis for proceeding in the action, which was nothing more nor less than the purpose and service of a summons under the Code.

By the practice, then, we see that the *capias* and the notice together was the first step towards commencing an action, or the means of obtaining judicial relief against the defendant, and they constituted the process, under the common law, as modified by the English statutes, which our laws had adopted.

Under the title "Process," Tomlin's Law Dictionary, after giving the mere general definition of the word, it is said that that is termed the process by the means of which a man is called into any temporal court, because it is the beginning or principle thereof by which the rest is directed—or, taken strictly, it is the proceeding, after the original, before judgment; and under the same title in which he explains the manner in or process by which actions were commenced in the different courts, he states that the subpoena *ad respondendum*, a "process" directed to the defendant, analogous to the subpoena in chancery or equity side of the exchequer, was one of the modes of commencing an action in the Exchequer Pleas. In this court nothing corresponding to the "original" writ was used. This author deals with the different means of commencing actions in the several courts as process. In *Branch vs. Branch*, 6 Fla., a writ of *replevin* is also recognized as process by the Supreme Court of Florida. 6 Fla., p. 314.

II. This brings us to our second proposition as to whether or not a summons, under the Code, is within the meaning of the term "process," as used in the Constitution? It serves the same offices that a summons *ad respondendum* did before its adoption and does since its repeal. By the service of it alone could jurisdiction of the person be had in commencing any action, and without it no judgment against the person could be rendered. It is the equivalent

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of an appearance. (Sec. 90.) It was, like the summons ad respondendum, the process against the person. In sections 47 and 48 it is spoken of as "process."

It has all the effect which the process used in the common law, as modified by the courts, and modified by the English statutes adopted by Florida, had. If it is not process, what is it, and why is it not? No purpose that it serves removes it from within the pale of process.

The only reason urged is, that it does not issue out of the clerk's office or court, but is issued by the attorney or the party plaintiff; and, to support this argument, they say that the clause in the Constitution only meant writs issued out of the court or its clerk's office. The Constitution does not so say, nor give any definition what process is. If issuance from a court or clerk's office is the test, it cannot be denied that the Legislature could soon make the clause in the Constitution a nullity by providing that attachments, subpoenas, and all other writs, shall be issued by attorneys or parties.

By the Code, prior to the amendment of 1872, executions were issued by the attorney or party, and no style of process was required, either before or after the amendment, by the terms of the law. No warrant or writ issued from the clerk's office in actions of replevin, or claim, or delivery.

It would have taken but little ingenuity to make similar provision in case of subpoena and all existing writs.

The execution under this argument was a process after the amendment, and not before, though it served the same important purpose in both. Applying the meaning intended by the makers of the Constitution, as before shown, to the purpose of the summons under the Code, it seems to us to be a process, and nothing else.

Tomlin says original process to call persons into court must be in the name of the King, (III., p. 324,) and our Constitution thus gets the idea of a style of process from the common law. The language of the Constitution is, "all process"—not original process, but *all process*.

III. Is the style of process an essential to process?

In *Curtis vs. McCulloh*, 3 Na., the court says: "The Constitution declares that the style of all process shall be the State of Nevada."

"The State is the sovereign by whose power alone the citizen can be compelled to appear in its courts to answer an action brought against him."

"There is no other authority by which the courts can obtain jurisdiction."

"In the matter, we are satisfied the defendant would have lost no right by a refusal to obey the writ because of the informality suggested, to-wit, want of style of process." See also 6 Fla., 322; 1 N. H., 139; 5 Ark., 104; 5 Gilman, 96; 1 Ark., 50, 132; 4 Miss., 27; 5 Miss., 229.

In construction of the Constitution, the courts have simply to declare what the Constitution has said. 5 Ind., 557.

WESTCOTT, J., delivered the opinion of the court.

Section 9 of the Declaration of Rights, contained in the Constitution of this State, provides that no person shall be deprived of life, liberty or property without due process of law. Section 2 of Article 6 of the Constitution provides that "the style of all process shall be 'The State of Florida.'" The term, process, as used in these two sections, has not the same signification. In the first it is used in a large and comprehensive sense. In the second it is used in its most restricted and limited sense. Says Baron Comyn, "Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment, but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's Courts, ought to be in the name of the King. It is called process because it proceeds or goes out upon former matter, either original or judicial."

The cases in which the terms, due process of law, have been defined, are various in their nature, and the definition

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in each case has been, to some extent, controlled by the nature of the subject undergoing judicial investigation. As applied to judicial proceedings the meaning is, "that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. By due process of law is most clearly intended the general law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial."

This clause does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of an action may be given by an attorney or party. It has never received such a construction by the courts. Where such an enactment is general and applies to all actions and to all individuals, as is the case of the Code such notice by an attorney is in conformity to the law of the land, and a judgment depriving a party of his property after such notice is, in contemplation of law, a deprivation by due process of law. Whether the notice given by the attorney be process or not, it is, for the reasons given, within the power of the Legislature, so far as this clause is a limitation, to authorize notice to be given in this manner.

It is contended that such summons as is authorized by the Code is process within the meaning of the constitutional provision, which requires the style of all process to be "The State of Florida;" that in this case the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance, and that the order setting it aside as a void judgment was correct.

Even if this summons was "process" within the meaning of the Constitution, the failure to insert the formal style required would only have been an irregularity, a misprision of the clerk, and amendable. The style of process is its title, and the title of process in civil cases has been a subject of amendment from a very early period in English history. That a *formal* requirement as to process is made by the Constitution is no more binding upon the court than if

made by an act of the Legislature, and is equally the subject of amendment in one case as the other. 2 Pick., 594; 32 N. H., 88; 15 N. H., 37; 7 Ark., 536.

Under the first English statute of amendment, (14 Ed. 3-6,) if not at common law, the title of process was amendable, (8 Co., 158; 1 Com., 579,) and the justices under subsequent statutes were authorized to amend process so long as such record was before them, *as well after judgment* as before, and it was not the practice to reverse a judgment for such misprisions of the clerk, but they amended the process in affirmance of the judgment. These statutes are in force in this State. Thompson's Compilation British Statutes, 13 to 40.

Our conclusion is that, even if this summons was process within the meaning of the Constitution, the defect here was merely formal; that the judgment was not void, and that if the court had any power over the judgment at a succeeding term it was to amend the process in this matter, and that it was error to set the judgment aside. 10 Wis., 100; 2 Pick., 594; 32 N. H., 88; 19 N. H., 394; 12 Kan., 422; 35 Mo., 197; 1 Fla., 381; 8 Fla., 29; 6 Fla., 322.

But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a process within the meaning of the Constitution? Baron Comyn, in giving the definition of the term process, says it imports the *writs which issue out of any court* to bring the party to answer or for doing execution. There is no definition of process given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily process. A party is entitled to notice and to a hearing under the Constitution before he can be effected, but it is nowhere declared or required that that notice shall be only *a writ issuing out of a court*.

In the States in which has existed a Code similar to the one under which this action was brought, we find the courts

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of last resort holding that such notice or summons need not be entitled or styled in the name of the State, although the constitutional requirement is substantially the same as ours in regulating the style of process. 12 Wis., 529; 4 Iowa, 43; 4 Mich., 588; 3 Penn., 99; 12 Min., 86.

The order setting aside the judgment as void is reversed.

DANIEL B. BIRD, ET AL., APPELLANTS, VS. WILLIAM
BIRD, ET AL., RESPONDENTS.

1. Crops grown upon the common estate by one tenant in common of the land, vest in and become the property of the occupying tenant. The other co-tenants have no property in such crops. In cases of encroachment, where there is a liability of the occupying tenant, it extends only to an accounting for what he has received beyond his first share. There is no property or lien in the produce.
2. As between tenants in common it is within the power of the chancellor in decreeing partition to direct the commissioners to assign the share containing the homestead to the surviving son, before that time occupying the homestead, rather than to surviving grandchildren. In such case, where the surviving son can retain the property, this action of the chancellor will not be disturbed. If, however, it is established that the assignment of the homestead will result in its going to his creditors, the homestead should be given to the grandchildren, as they should be preferred to creditors of the son.

Appeal from Jefferson county, Second Judicial District.
The opinion of the court contains a statement of the case.

Pasco and Scott for Appellants.

From the original bill filed in this cause it will be seen that all the complainants were infants, and that they were co-tenants of a certain estate—"Nacoosa"—with the defendant, W. C. Bird. That defendant, W. C. Bird, had entered

upon said estate in 1867, and been in possession thereof since that time, receiving to his own use all rents, issues and profits of the said estate. The bill prayed for a partition of the common estate, and an account of the rents, issues and profits thereof.

Afterwards, to-wit: June 3d, 1873, complainants filed their supplemental bill against the original defendant, Bird, and against Earle & Perkins, commission merchants. In addition to the matters set up in the original bill, it is charged that the said Bird attempted to mortgage the entire common estate, and the annual crops, year after year, to Earle & Perkins.

Defendant Bird did not answer, or demur, or plead to the supplemental bill, and a decree *pro confesso* was taken against him.

Defendants Earle & Perkins answered said bill, admitting the statements of complainants' bill, and that they had received the crops of cotton mortgaged to them by W. C. Bird, and had applied the proceeds of the same to the payment of the indebtedness of said Bird to their said firm for advances made by them to said Bird.

On December 13th, 1873, the court made an order appointing commissioners to divide and partition said common estate, and a referee was appointed to state an account against defendant Bird for rents, &c., during the time he had occupied the common estate.

The commissioners met, valued the lands, divided them into three equal parts, upon one of which was situated the old homestead of the family, and certain improvements made before defendant Bird went into possession of it. Defendant Bird appeared before the commissioners and claimed as a right that that part of the common estate whereon the old family homestead and improvements were situated, should be set apart by the commissioners to him. The majority of the commissioners differed with the said defendant Bird and with the other commissioners, and proceeded to

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partition the said lands by drawing lots for the several parts; and upon drawing the said lots, the part desired by defendant Bird fell to the children of the oldest son, D. B. Bird, the brother of defendant W. C. Bird. The commissioners, having discharged their duty, reported their action, and filed their report of the partition February 19, A. D. 1874; exceptions were filed to the report of the commissioners March 18, 1874, and amended exceptions 30th of May, 1874, to the effect that the commissioners should have divided the land according to the wishes of the said defendant Bird, and should have set apart to him the homestead and improvements.

The referee's report was filed on July 30, 1874, with the testimony taken by him, and an account showing the amount due by defendant Bird to complainants on account of rents of said common estate, up to and including the year 1873, with interest to August 1, 1874. Exceptions to this report were filed on the 28th of August, 1874. On December 1, 1874, defendant Bird filed a petition to set aside the report of the commissioners, (although his exceptions to said report were then on file,) and prayed in said petition that the court would order a new partition of said lands, at which that portion upon which the old family homestead and improvements are located should be set off to him, and alleging as a reason for this, that he would otherwise be left without a home for his family. The infant complainants answered this petition, denying that defendant had any superior equity to theirs; that he was an adult in possession of their property, and enjoying the rents, issues and profits of the same. That their co-tenant, defendant Bird, did, at one time, have a home of his own, given him by his parents, which he has mortgaged and which has been sold under a decree of foreclosure. They also aver, and it is not denied or disproved, that defendant Bird's interest in the common property is mortgaged to Earle & Perkins for more than its

value, and that if the portion he desired should be allotted to him, he could not get the benefit of it.

On the 26th of December, ———, the court made an order setting aside the report of the commissioners, and also setting aside the report of the referee, and a new reference was ordered.

The court also held that Earle & Perkins could not be held responsible to complainants for any part of the proceeds of the crops received by them from W. C. Bird. The court also made an order removing the commissioners before appointed and appointing three others, with instructions to set apart to defendant Bird that part of the estate he desires, i. e., the family homestead and improvements, and part adjoining thereto.

We claim that the court erred in setting aside the commissioners' report, in setting aside the report of the referee and in deciding that defendants, Earle & Perkins, were not liable to account with complainants for any part of the proceeds of the crops raised by Bird on the infant's estate, and turned over by him to them in satisfaction of a prior indebtedness of said Bird to them.

1. The commissioners' report should have been confirmed. The report of commissioners appointed to partition common property, should be disturbed only upon grounds that would justify the judge in setting aside the verdict of a petit jury. It should even be regarded with more consideration. See Freeman on Co-tenancy and Partition, § 525; 4 Dess. Ch. R., 85; 8 Ves., 143; Thomp. Dig., 384-5; 19 Tex., 567; 2 Dan. Ch. Pr., 1134; Freeman, 632, § 522, note.

The statute of Florida, Thompson's Digest, 384-5, has fixed the principle, as it seems to us, in all cases of partition, by declaring that in partition between co-parceners no one shall have any advantage over the others. This will require the use of the lot. But defendant Bird, if he was entitled to any preference in the partition, which he is not, waived it by failing to set it up by way of answer to the

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original bill or by cross-bill. After having had his chance to obtain the part he desired by the lot, it would be inequitable to allow his petition for another partition of the lands. See Freeman, § 449.

There is no equity in the claim set up by the defendant, W. C. Bird, to have any particular portion of the common estate set apart to him. It does not appear, nor is it a fact that W. C. Bird is, in any position with respect to this property, (the homestead tract,) as would render the refusal of the commissioners to assign it to him inequitable; on the contrary, we claim, that under the circumstances, it would be inequitable to give him any advantage in the division of this common property. The said Bird does not claim to have improved this portion of the estate, and on the contrary, it may be inferred, and is a fact, that from its long use by him, (without rent,) it has greatly deteriorated in value; besides all this, we claim the said W. C. Bird is in the position of a trustee, who has grossly abused his trust. In 1867 he entered upon the common estate while his co-tenants were infants, claimed the estate as his own and did all in his power to defeat the interests of his co-tenants, and is now in a position to expect from a court of equity a severe reckoning for the abuse of his trust, rather than to demand partiality as a favored suitor. When it is remembered that it is charged, and not disputed, that defendant Bird is an insolvent, and the very interest in the common estate is mortgaged for more than its value, and the infants without any hope of remuneration for the use by him of their property for so many years, a feeling of surprise is awakened that a court of equity should be petitioned to set apart to him the only part of the common estate, which, in consequence of its being improved, could be of value to the infants. "Any person entering upon the lands of infants is regarded in equity in the light of a receiver, guardian, bailiff or trustee of such infants, and he will be held to a strict account." See Story's Eq. Jur., § 511, 1356; Perry

on Trusts, § 603; 8 H., 531; 3 Atkins, 304; Story's Eq., § 1352; 2 P. Williams, 112; 5 Madd. R., 77; Story's Eq., 1341; 8 Paige, 152; 2 P. Williams, 103; John. Chy., 49; 6 Paige, 366; 10 Ves., 524, 378; 7 Term R., 309; 6 Ves., 892, 542; 27 Beav., 508; 8 Id., 250.

These cases all illustrate the peculiar vigilance exercised by courts of equity over the estates of infants, especially when they are wards of the court, as these infants became when they commenced these proceedings to assert their rights to this property.

Again: The court erred in setting aside the report of the referee. It is not denied that any tenant in common entering upon the common property, cultivating, using and enjoying the same, exclusive of his co-tenants, is bound to account with his co-tenants for the rents, issues and profits of the common estate received by him over and above his just and proportionate share. See 16 Gratt., 21; 19 ib., 95; 6 Ves., 498; 2 Stock. Chy., 98; 5 Madd. Chy., 363; 44 Vt., 200; 13 Ill., 107; 47 ib., 460; 2 Hill Chy., 111; 3 Nevada, 531; Story's Eq., § 655; 1 Lomax Dig., 508.

Defendant Bird's responsibility to the infant co-tenants as trustee for them, is based, not only upon the fact that he, an adult, entered upon their property and appropriated the whole proceeds to his own use, but also upon the fact that his original entry was an ouster of his co-tenants. His entry was not in the character or with the intent to occupy the property as co-tenant with the infants, but with the intent to retain possession of the whole estate as his own separate property. This fact appears from his the said Bird's answer to the original bill, in which he distinctly claims the entire estate as his own by virtue of the original agreement between Daniel Bird, his father, and William Bellamy. It is true he afterwards abandoned this position; but his setting it up at all explains the character of his original entry, and holding for several years, and that he was from the first a disseisor of his infant co-tenants, and as such, a

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trustee in equity for them. That he held this land adversely in intention and fact, is also shown by the fact of **his** mortgaging the entire property to the defendants, Earle & Perkins, representing at the time to them that it was **his** own property, as seen in the answer of the said Earle & Perkins to the supplemental bill of complaint. See 27 Tex., 328; 4 Mason C. C., 330; 4 Mo., 161; 3 Watts, 77; 20 Ark., 359; 2 Gr. Ev., § 318; 7 Wheat., 60, 121; 10 Barr, 224; 44 N. Y., 572; 15 Ala., 363; 8 Mou., 177.

We come now to fix upon Earle & Perkins the responsibility of trustees of these infants of so much of these crops mortgaged to them by said W. C. Bird, in payment of **his** individual debts to them. We admit that they are entitled to be re-imbursed to the extent of the advances made to said Bird to defray the reasonable expenses of the plantation, but that they are trustees for the infants for two-thirds of the balance remaining in their hands, which was mortgaged to them by Bird to pay an antecedent debt. We have shown that Bird is a trustee of this property for the infants. We now show that defendants Earle & Perkins are also trustees for the infants and accountable to them as such for two-thirds of the net proceeds of the sale of crops mortgaged to them by defendant Bird while occupying the common estate. The answer of Earle & Perkins shows that defendant was indebted to them, and in January, 1869, executed to them a mortgage of the entire common estate, and all the crops to be raised thereon. That they received these crops for several years while this suit was in progress, it having been commenced in July, 1869, and sold the same and applied the proceeds thereof to Bird's indebtedness to them. Earle & Perkins are then in the position of purchasers, with notice of the rights of the infants, (the record of the deed of the land and the pendency of this suit being constructive notice.) The principle that a person purchasing trust property from a trustee with notice of the trust in consideration of the past indebtedness of

e trustee to the purchaser, is bound by the trust, and will himself become by such purchase a trustee of the property purchased, is too old and well established to require a citation of authorities to sustain it. See the authorities cited in the appeal of D. B. Bird *et al.*, vs. Earle and Perkins, argued at the present term before this court.

George P. Raney and J. W. Malone for W. C. Bird.

I. The court committed no error in setting aside the partition made by the commissioners.

It was made by but two of the commissioners. These were appointed as required by the statute, and only two acted. It was necessary that all three should act. Thompson, 384-5; Perry on Trusts, Sec. 411; 4 N. H., 53; 11 Barbours, 527.

It was the duty of the commissioners to assign to the respective tenants in common, taking the heirs of D. B. and B. Bird, respectively and collectively, a particular part, and not to have resorted to casting lots, except in the last extremity. 2 Vol. Leading Cases in Equity, p. 642; 1 Md. Decisions, 223.

II. The order appointing new commissioners, and the instructions therein contained, were proper and legal.

In making partitions, courts of equity administer relief *ex equo et bono*," according to their own notions of general justice and equity between the parties, and will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them, with reference to their respective situations in relation to the property before the partition, and will give special instructions to the commissioners. 1 Story Juris., Sec. 656-7; Barbours, 509; 4 Halstead's Chancery, 557-8; 1 Leading Cases in Equity, 641-2; 4 Barbours, 228; 1 McMull. Eq. Rep., 63; 11 Texas, 385; 1 P. Williams, 446, cited in 2d Cruise's Digest, m. p. 539-40; 1 Green., 345; 7 B. Monroe, 5; 7 J. J. Marshall, 148; 7 Dana, 176.

The court, in directing the commissioners to give W. C. Bird that part upon which the homestead, etc., are, did no wrong or injustice to any of the other tenants. Being the only surviving son, and having lived there, and raised his family there, and being without any other home, and insolvent, it is but right that the homestead should be preserved to him, if it can be done and the representatives of the deceased brothers preserved equal values. He is benefitted thereby, but they are not injured. If the homestead was assigned to either set of children, it would afterwards have to be given or assigned to some one of them on partition. All could not keep it as a homestead.

The report of the commissioners is sufficient to satisfy the court that the property can be divided in three equal portions. If this can be done, why deprive this respondent and his family of a home? Why turn him out upon the world without shelter? Why not give him a shelter, when, by doing it, no one is harmed? The record shows the plaintiffs have homes and protection under the roofs of their mothers.

III. The master's report was erroneous, and should have been set aside, for the following reasons:

1. The report fixes the rental of the lands mentioned therein, for 1870, 1871, 1872 and 1873, at the rate fixed by the commissioners for the years 1868 and 1869, whereas there is no testimony as to which was a proper amount of rental for said years 1870, etc., nor an average rental.

2. There is no testimony to sustain the rental decided upon by the master for 1870, etc. It is merely the master's personal opinion.

3. There was no testimony to sustain the deduction or discount on scrip in payment of taxes.

4. The master has not found consistently with the testimony and as to the value of the improvements.

5. The report is not consistent with the order or the testimony.

IV. The restraining order of November 27, 1874, was improper, and should not have been granted.

The petition shows no title or interest in the crops, or any lien upon the same, by judgment, execution, or otherwise. It does not even allege fraud. The allegation of insolvency is not sufficient. High on Injunctions, Secs. 25, 26, 21; 2 Johns. Chan., 144.

The following authorities show that the complainants, as tenants in common, had no claim upon the defendant, Bird, for any share of the crops, either by the common law or the statute of Anne. Such is the current of authority in this country and England: 9 Eng. Law and Equity, 337; 40 Me., 56; 2 Gray, 424; 12 Cal., 414; 18 Barbour, 265; 6 Gray, 118; 12 Mass., 153.

Even admitting the doctrine laid down in Virginia, and one or two other States, which is against the current of authority, there is nothing in the pleadings showing that Bird has received more than his just share or proportion of the whole crop. 2 Gray, 425; 14 Ga., 429.

If, on the other hand, it is right to claim a rental from Bird, either for the year 1874 or other years, and to restrain the disposal of the crop of 1874 so far as to make it answer this claim of rent, or both, there is no ground for equitable interference by the court. The partition of the complainants, and their additional or supplemental complaint, and the answer of Bird to the additional complaint, show that there was no ground for granting the restraining order. They were mere general creditors, if they had any claim, and have and show no equity. 2 Johns. Chan. 144; High on Injunctions, Sec. 7; 3 C. E. Green, 26; 9 Gill & J., 472; 13 Cal. 190.

Papy & Raney for Respondents.

A trust is defined to be an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence.

Trusts are divided into simple and special trusts, but we have no need to consider either of these divisions in this case.

In reference to their creation, trusts are divided into express trusts, implied trusts, resulting trusts, and constructive trusts.

Express trusts are created by instrument, or arise out of express contracts that point out the property and purposes of the trust.

Implied trusts are trusts that courts imply from the words of an instrument where no express trusts are declared, but the courts imply that it was the purpose to create a trust.

Resulting trusts are trusts that courts presume to arise out of the transactions of parties, as where one man pays the purchase money and the deed is taken in the name of another. The presumption in such cases is that a trust was intended.

A constructive trust is one that arises when a person, clothed with some fiduciary character, by fraud, or otherwise, gains some advantage to himself.

This classification and definition will be found in Perry on Trusts, p. 13. We give them here, in order that we may, when we come to consider this case, determine whether it falls within any one of the divisions of the subject, or whether it comes under neither, as we confidently affirm.

It is alleged in the bill that Earle & Perkins are trustees of these plaintiffs, and are accountable to them for the proceeds of the cotton which were applied, as agreed between the parties, in payment of the advances made by them to W. C. Bird to make the crops, and that this trust arises out of the facts charged, and which are herein briefly set forth.

We will not consider the first sub-division of trusts, hereinbefore stated, because there is no pretence of an express trust in this case. There being no express trust, can the case be brought within the second sub-division of implied

sts? Clearly not, because there is no instrument or contract of any character to which Earle & Perkins are parties, from the terms of which a trust of any character can be implied. There is no allegation of the sort. There is nothing in this case—no contract, agreement, or transaction—from which the court can imply a trust, so far as Earle & Perkins are concerned, or infer that it was the intention of the parties to create a trust.

Neither can the case be brought within the third subdivision, and be said to be a resulting trust. There is no element in the case from which a resulting trust can arise, and we will not consider it further.

All of these three classes of trusts come within the intention or supposed intention and contemplation of the parties, and, as we have said, there is nothing in this case which can bring it within either.

But the fourth sub-division, viz., constructive trusts, are within the intention of the parties, but they are thrust upon parties contrary to their intention and against their consent, and it is under this latter sub-division that we presume it is sought to bring the case.

It is said that constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise. Perry on Trusts, 137.

1. Trusts that arise from actual fraud practiced by one upon another.

2. Trusts that arise from constructive fraud, as where a guardian purchases from his ward, or a trustee from a cestui que trust. Though there may be no actual taint in the transaction, yet, on account of the inconvenience or danger of allowing such contracts to be made, courts of equity consider such contracts to be fraudulent, *prima facie*, and they consider a trust to arise therefrom.

3. Trusts that arise from some equitable principle, independent of fraud, as where an estate has been purchased

and the money paid, but the deed has not been taken, equity will raise a trust by construction of the purchaser.

Was there any actual fraud in this case, from which a trust can arise? There is no pretence of this, and we need not consider this branch of the subject.

Can the case be brought under the second class of constructive trusts? The defendants, Earle & Perkins, occupied no relation to the plaintiffs, made no contracts with them, nor did they deal with their estate, nor knowing with any person occupying a fiduciary relation to them, or by any act of theirs, devise an advantage to themselves which a court of equity would or could condemn. Indeed, they have not even been reimbursed for their outlay, and have not touched the property of the plaintiffs. No circumstance or fact of imposition is even suggested from which a trust can be construed, or from which a trust can arise from any equitable principle independent of fraud or imposition; and if no equitable principle applicable to the facts in this case, independent of fraud, can be invoked in support of the proposition that Earle & Perkins are trustees, it results that the case can fall under neither of the classes of constructive trusts mentioned.

It becomes manifest, then, that Earle & Perkins are neither express, implied, resulting, or constructive trustees, and therefore no trustees at all, and in no way liable to account to the plaintiffs.

But, it may be said that W. C. Bird was a trustee for the plaintiffs, and that Earle & Perkins dealt with him in that character, and are therefore accountable to the extent that he may be alleged to be accountable.

1. We affirm that even if W. C. Bird was a trustee, as alleged, that Earle & Perkins, though dealing with him with full knowledge of his alleged fiduciary character, are in nowise accountable to the plaintiffs.

2. That W. C. Bird himself was in no sense a trustee for the plaintiffs.

But, first assuming he was a trustee, it in nowise follows that, in endeavoring to make the trust property productive, he could not incur a debt payable out of the crops to be raised by the very means furnished by the creditor. Let it be remembered that the subject of the trust was land alone; that, to make it productive of income, other elements were necessary, such as labor, mules, teams, agricultural implements, provisions, supplies of various kinds, and the labors, attention and supervision of W. C. Bird himself. As trustee, supposing him to be such, it might become, and it did become, necessary for him to obtain money to enable him to carry on planting operations. Without it the land would yield nothing to himself or the cestuis que trust. He was justified, therefore, in law, to create a debt secured on the crops to be made; and even without such security, a court of equity would subject the crops or their proceeds to the payment of the creditors for the advances made. We may admit that he could not encumber the portion of the land itself belonging to the cestuis que trust, but he had the right to pledge the crops to obtain money to enable him to cultivate it. No injury results to the cestuis que trust, because they would be only entitled to the surplus after the debt is discharged. The law does not give them the advantage of taking from the creditor the very money advanced. Such would be the case if the claim set up by the plaintiffs here is sustained; for, until the creditor is paid, nothing has proceeded from the land to which they would be entitled. It would seem to be scarcely necessary to cite authorities for so simple and familiar a principle.

But W. C. Bird was in no sense a trustee. What has been hereinbefore affirmed in regard to the alleged trusteeship of Earle & Perkins, and the doctrines advanced in connection therewith, applies with equal force to the assumed trusteeship of W. C. Bird.

It may be said that Bird must be held to be a trustee be-

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cause he was in possession, cultivating the land, two-thirds interest in which belonged to the plaintiffs. We reply that he was in possession in his own, and not in right of others. He was at least a tenant in common, and, as such, was entitled to possession in his own right, and, in occupying, did no more than he had a right to do on his own account. His entry was not a trespass, and his holding was not a wrong. By common law, the occupancy of the premises by one tenant in common did not entitle the co-tenant to call him to an account. The statute of 4 Anne rendered him liable to account for receiving more than his just share, but nowhere is it said that he occupies the relation of trustee. The action against him is a common law action, and not grounded upon a trust.

In some of the States a tenant in common, occupying and cultivating more than his share, and deriving profits, may be held accountable, but not as upon a trust. The general doctrine held, ever since the statute of Anne, is, that occupancy and taking crops do not give the right of action. There must be a reception of money from a third party, and for the excess over the just share of the tenant receiving it is the action allowed. In most of the cases in which the question has come up, such has been the ruling. And it has been held that the statute of Anne only applies to cases where one tenant in common received from a third person money, or something else, to which both co-tenants were entitled by reason of their co-tenancy, and retained more than his share. See 12 Cal., 414; 9 Eng. Law and Equity, 347; 6 Gray, 118; 12 Mass., 152.

WESTCOTT, J., delivered the opinion of the court.

The appeal in this case is from two decrees of the Chancellor—one final, the other interlocutory. The final decree, from which the appeal is taken, dismisses the bill as to the defendants, Earle & Perkins, and this action is the general error assigned as to that decree. The interlocutory de-

ree, which the appeal brings here for review, directs the commissioners appointed to partition the lands to assign to defendant, W. C. Bird, in the partition prayed for, that portion of the land which embraces the homestead of the family; directs an account to be taken of the rents and profits of the land which has been in the possession of W. C. Bird, and revokes the order restraining Bird from disposing of the crops.

Defendant, W. C. Bird, takes no appeal from that portion of the interlocutory decree which directs an account to be taken of the rents and profits received by him, nor do the appellants here present that question. It is, therefore, not before us for consideration.

The two general questions presented are: Was the decree dismissing this bill, as to Earle & Perkins, error? Was the interlocutory decree erroneous in so far as it directed the commissioners, in making the partition, to assign to W. C. Bird the portion upon which was located the family homestead, and in so far as it restrained W. C. Bird from disposing of the crops?

Upon the death of Daniel Bird, in the year 1867, the plaintiffs, children of Daniel B. Bird, and grand-children of Daniel Bird, became entitled to one-third interest in a tract of land in Jefferson county; the plaintiffs, children of Pickens B. Bird, and grand-children of Daniel Bird, became entitled to one-third interest; and the defendant, W. C. Bird, the son of Daniel Bird, became entitled to the remaining third. They were tenants in common.

At the death of the grandfather, W. C. Bird was in possession of the entire tract, and has so remained up to this time, with the exception of the year 1874. As to this year, the plaintiffs allege an entire and exclusive possession, while Bird answers that he has cultivated only a part for that year, and that he has been willing for the others to occupy. Up to 1874, it is admitted that he occupied and used the entire tract, appropriating the rents, issues and profits

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thereof. During this period Earle & Perkins, commission merchants, advanced to him moneys, taking mortgages upon his crops, from year to year, to secure the repayment of the sums so advanced; and the defendant, Bird, in compliance with his contract, turned over his crops annually to Earle & Perkins, who sold them and applied the proceeds to the payment of the indebtedness of Bird to them.

The original bill was filed in 1869 against defendant, W. C. Bird, and its prayer was for a partition and account of the rents and profits. In June, 1870, the plaintiffs agreed to sell their interests in the land to the defendant, and the court, after ascertaining the values in accordance with the agreement, on the 27th day of May, 1872, appointed a referee and directed a sale upon the terms agreed upon. On the 10th of May, 1873, the referee reported to the court a failure on the part of defendant, Bird, to comply with the agreement of the sale, and requested further instructions, or that he be discharged. The court took no action upon this report.

On the 17th day of February, A. D. 1873, defendant, Bird, executed a mortgage upon all the crops of cotton, corn and fodder to be raised by him during that year. This mortgage was conditioned to pay advances for the crops for that year, and to apply any remaining balance to the debt due them by him for antecedent advances.

It will be seen that this mortgage was given while Bird was in possession, under a contract of purchase from the plaintiffs, which had been agreed to by them, and which had been approved by the court.

A receiver was appointed of these crops of 1873, by the court, in another suit, wherein Earle and Perkins sought a foreclosure of their mortgage, and the proceeds of the sales thereof are now under the control of the court.

Under this state of facts, the claim now here made is, that defendant, W. C. Bird, having controlled the interests of the infant plaintiffs in this land since 1867, is liable to

m as trustee or guardian, and that defendants, Earle & Skins, having received all of the crops raised thereon, are likewise liable as trustees, and that they should be decreed account therefore. The precise question, therefore, which we have to determine, is: Is the mortgagee of crops grown by a tenant in common of the land, who has possession of the entire estate, responsible as trustee to other infant tenants in common of the land with the mortgagor, such mortgagee having received the crops and appropriated the same to the payment of his mortgage debt?

Appellants insist that the infant tenants in common had no property and title in the crops grown by their co-tenant to the extent of their interest in the land, and invoke in their behalf the familiar principle that when a person enters upon, or takes possession of *the property* of an infant, a court of equity will consider such person entering as guardian or trustee, and will decree an account against him. That such is the law cannot be questioned. 31 Eng. Chy., 11; 8 Fla., 153. But is it true that infant tenants in common land are tenants in common of the crops produced thereon by their co-tenant, through a sole use and occupation of the common estate?

In Coke Litt., 200, b., the common law upon the subject of tenants in common is thus announced: "If one tenant in common maketh his companion his bailiff of his part, he shall have his action of account against him. But although one tenant in common, without being made bailiff, take the whole profits, no action of account lies against him."

It was manifestly unjust to permit one tenant in common thus to take the whole profits of the common estate without accounting, and it was the purpose of the statute of 4 Ann., Ch. 16, to correct that evil. That statute, which is in force in this State, enacted that an action of account shall lie by one tenant in common against another who has *actually received more than his share of the profits.*

Under the statute of Ann, it was no longer necessary that one tenant in common should take the profits as bailiff by appointment to make him responsible. It was only necessary that he should receive more than his just share of the profits. By this act, and without appointment by his co-tenant, he became bailiff, and was responsible for what he actually *received* beyond his just share.

The English courts, however, held that there was not a *receiving* within the meaning of the statute in cases where one tenant in common had enjoyed more of the benefit of the subject or made more by its occupation than the other, and restricted the statute to cases only where one tenant in common receives money, or something else, from *another person*, to which both co-tenants are entitled by reason of their being tenants in common, and in proportion to their interest as such, and of which the one receives and keeps more than his just share according to that proportion. Mere occupancy by one tenant in common, under this decision, involved no liability to account to another tenant in common. These are the views announced by Baron Parke in 9 Eng. Law and Eq., 339.

The same view has obtained in the United States, in the States of Massachusetts, (12 Mass., 156,) California, (12 Cal., 422,) New York, (18 Barbour, 265,) Kentucky, (7 J. J. Mar., 139,) Maryland, (30 Md., 126,) New Jersey, (3 Stock, 404,) and Missouri, (29 Mo., 366.) A different doctrine has prevailed in the States of Virginia, (16 Gratt., 21, 52,) Vermont, (44 Vmt., 347,) South Carolina, (1 McMullin, 69,) and Georgia, (14 Ga., 436.)

In these States the occupying tenant has been held responsible for what he has realized beyond his just proportion, and has been sometimes charged with a yearly rental valuation.

Where there has been an ouster of one tenant in common by another, or a use of the whole property, accompanied by an exclusion, then an account is decreed. 30 Md.,

126; 44 Vt., 348; 27 Ind., 52; 22 N. J., 85; 28 Iowa, 527.

After a careful examination of all the authorities upon this subject cited by the appellant, as well as many more which we have consulted, we can find no sanction for the view that the plaintiffs had any *property* in the products raised by defendant, Bird. Even where there is a liability, it is a liability to account for rents and profits received as distinct from a liability in an action for conversion of the property, or other like action based upon a right of property in the plaintiff. Each tenant in common has an equal right of entry and possession. The possession of one is, in contemplation of law, the possession of the other, and to rebut such presumption, an actual ouster must be shown.

The title and property in the crops raised upon the land occupied by the one tenant in common vest in him. He can mortgage and sell the entire crop, and if it is gathered before partition, the crop is his property. These crops have been the result of his separate occupation, the use of his labor, skill and industry. The crop of 1873 was made during an occupancy by consent of the plaintiffs, and under the sanction of the court. Bird, having received advances from Earle & Perkins under these circumstances, their mortgage upon the crops gathered, and the proceeds of which are now under the control of the court, is good as against the claim of property urged by plaintiffs. As to the crop of 1873, Bird was in possession by their agreement, and if plaintiffs had disturbed his possession, they would have been trespassers. They have no property in these crops. A growing crop is part of the freehold. Had plaintiffs obtained partition while the crops were growing, they would have been, as against Bird, entitled in severalty to such part as was growing upon the land assigned them. 4 Met., 415; 4 Kent, 370. Whether this would have been the rule as against the merchant making advances, through which the crops were raised, it is unnecessary here to enquire, as there has been no such partition.

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Our conclusion upon this branch of the case, is that neither Bird nor Earle & Perkins, in appropriating the crops raised upon the common estate, entered upon or used the property of an infant; that the title and ownership of these crops was in the occupying tenant, subject to liability to an account, if his possession was adverse and exclusive, or the result of ouster.

The claim that either Bird or Perkins held the legal title to these crops as trustee, or that they were in any manner trustees, cannot be entertained. If Bird had the right of property in the crop as an incident to his right of entry and possession, labor and cultivation, then it is impossible that he can be a trustee for the benefit of others in property in which he has the entire, the sole and exclusive property himself, unless one who has the absolute and unqualified ownership of a chattel can be the trustee of another as to that chattel, a proposition so manifestly erroneous, that it needs only to be mentioned to perceive its error.

In a case of precisely similar character to this in many respects, and where infants were plaintiffs, the court of appeals of South Carolina held expressly that defendants occupying the relation that Bird does in this case to the plaintiffs, could not be regarded as trustees of the complainants. 1 Speer's Eq. Cas., 264.

If Bird cannot be so regarded, as a matter of course his mortgagee for value, with knowledge of the state of his title, cannot be treated as a trustee.

The bill as to Earle & Perkins was properly dismissed. Plaintiffs had neither equitable nor legal right as against them. If they had any right against Bird, it did not extend beyond a right to an account; there was neither lien nor property in the crops raised by his labor and occupation.

The next and only remaining question presented by this appeal is, was the interlocutory decree erroneous in so far as it revoked the restraining order of November 27, 1874, and in so far as it directed the commissioners in making the

partition to assign to W. C. Bird the portion upon which was located the family homestead?

The order of November 27 restrained Bird from disposing of the crops made by him. He alleges in his answer that he did not, for the year 1874, cultivate more than one-third of the land. He swears positively that he did not exclude his co-tenants. As to the other crops the plaintiffs we have seen have no property in them or lien thereon. We can see no ground for the restraining order. It was properly revoked.

The next question is as to the matter of the partition.

The power of the chancellor over the entire subject cannot be denied. He cannot be bound against his own views of right, and in the exercise of his general discretion, by the action of the commissioners. And while it is unquestionably true, as a general rule, that the chancellor should adopt the action of parties appointed by himself to take testimony, inspect the lands, and after consideration of the entire subject, to act; still there is no absolute rule making it his duty so to do. Under the statute he has power to remove the commissioners, and the whole matter is one of judicial discretion with which this court will not interfere, unless in a plain case of wrong and injustice. It is the general doctrine prevailing in appellate courts that they will not, except in plain cases, interfere with such discretions. Except as is otherwise provided in the statute, the chancellor had all the powers of a court of equity over the subject. The court is invested with all the cumulative powers created by the statute, and retains all chancery attributes except as otherwise provided by the act.

It cannot be denied that it was within the power of the court to direct the commissioners to assign to Bird that part of the land upon which was situated the homestead. Mr. Justice Story says: "The court should assign to the parties respectively such parts of the estate as would best accommodate them and be of most value to them with refer-

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ence to their respective situations in relation to the property before the partition." Nor will courts of equity, in making these adjustments, "confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common."

We cannot see that the plaintiffs, either the children of Daniel B. Bird or of Pickens B. Bird, stand in any such relation to the homestead in this cause as would induce us to control the discretion of the chancellor, and direct its assignment against his judgment to one or the other of them, except upon one hypothesis. If the fact be that the allotment of the homestead placed to W. C. Bird will result in its being subject to a heavy mortgage debt of such character as will render it subject to sale, and it is not made to appear by W. C. Bird that he can retain it as his homestead, then it should be assigned to the children of one or the other of the brothers as the chancellor may, in his discretion, determine is best under all the circumstances. The plaintiffs allege that such a mortgage deed exist; that defendant Bird is in no condition to redeem; that the assignment of the homestead place to him is an assignment virtually to his creditors or to purchasers at a sale to be had under the mortgage; that both he and his wife have waived all right of homestead in the premises, and have executed deeds by which they have consented to a sale to pay their debt. If this will be the result, then it is manifestly and plainly unjust to prefer the creditors of W. C. Bird to the children of his brothers. If this will not be the result, then defendant Bird has certainly an equal right to the homestead, and such assignment should not be disturbed. The assignment cannot be affected by a liability to account, if there be such liability, or the appropriation of past crops. It should be made with reference to the respective situations of those interested to the property before partition. In this case the

homestead was occupied by W. C. Bird; the plaintiffs, infants, had other homes. Why should they be given the homestead, and W. C. Bird denied it? W. C. Bird is the only surviving son, and has been occupying it as a home.

The record now before the court does not enable us to come to any conclusion upon this subject, nor did the testimony and record before the chancellor enable him to pass upon this question. The result is that this case must go to the court below for a determination of the question of partition and for further proceedings. The decree dismissing the bill as to Earle & Perkins is affirmed. The interlocutory decree, so far as it assigns to defendant W. C. Bird the homestead place, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion and conformable to law.

DANIEL B. BIRD, ET AL., APPELLANTS, VS. EARLE & PERKINS, RESPONDENTS.

1. The relation of landlord and tenant does not exist between one tenant in common and the other co-tenants, where the one occupies the common estate in his own right, and without contract, express or implied, with his co-tenants.
2. A final decree, based upon a consideration of all the equities of the parties, if correct, will not be reversed on account of the appointment of an improper person as receiver during the progress of the cause.

Appeal from Jefferson county, Second Judicial District.

The opinion of the court contains a statement of the case.

Other points involved in this case are decided in the case reported just before this, where the co-tenants, upon their own bill, sought relief against the mortgagee of the occupying tenant and the occupying tenant.

Bird et al. v. Earle & Perkins.

Wm. Scott for Appellants.

This suit was commenced by the appellees, on the 5th day of January, 1875, against W. C. Bird, the mortgagor, to foreclose a mortgage on the crops of the year A. D. 1873, and which mortgage was given by the said W. C. Bird to secure Earle & Perkins for advances made and to be made by them to the said W. C. Bird.

The lands upon which these crops so mortgaged were to be produced were certain lands in which the infant plaintiffs in this appeal had a two-third interest, and for the partition of which said infants had, nearly five years previously, commenced their suit in the Jefferson County Circuit Court, and in which suit Earle & Perkins were themselves parties defendant. The suit for partition was commenced in July, 1869, against W. C. Bird, and in 187— Earle & Perkins were, by amendment, made parties defendant. Not only was there a partition of the lands sought in said suit, but an account was prayed for against defendant, Bird, of the rents, issues and profits of the said land, and also an account against Earle & Perkins for the proceeds of the crops produced on the estate and forwarded to them in settlement of Birds' private debt to them, in pursuance of an agreement made with them by him to that effect in the said mortgage. The plaintiffs claim that if they have, as they contend they have, the right to demand an account of defendant, Bird, of the rents, issues and profits of the common property prior to 1869, then they have the right to demand their share of the crops raised by their trustee on this property since the commencement of their suit for partition and account, in July, 1869. All the transactions between Bird and Earle & Perkins since July, 1869, were utterly null and void, so far as they affected the rights of these infants. The common doctrine of *lis pendens* applies to this case. Tenants in common have the right to an account from their co-tenant who has been in the exclusive possession of the common estate and receiving to his own

use the rents, issues and profits thereof. See 16 Gratt., 21; 19 Id., 28; 1 McMullin; 4 Kent, Sec. 64, p. 386, 370; Sto. Eq. Jur., Sec. 655; 1 Jac. R., 574; 5 Madd. R., 363; 1 Young & Coll., 538, 586.

The tenants in common of W. C. Bird being infants, and incapable of giving their consent, either actual or constructive, to his entering upon their property, he must be considered in so doing as a trespasser, and he constituted himself, by his conduct, the trustee or guardian for said infants, and the court, in its vigilant care over the interests of the infant, will hold him to a strict account as trustee and guardian of the said infants. See Perry on Trusts, Sec. 871-2; 1 Atkins, 543, 489; 1 Vernon, 295; 2 Id., 342; 3 Atkins, 130; 3 Id., 337; 1 Gill, 367; 1 Gill & Harris, 220; 22 Ga., 131; 7 Term. R., 390; 6 Vesey, 89; 27 Beav., 508; 8 Id., 280; Story Eq. Juris., Secs. 511, 1356; 6 Whart. R., 620; 3 Yeates, 251; 2 P. Williams, 645.

If Bird is held and treated in equity as guardian or trustee of the infants, by virtue of his interference with their two-thirds interest in this estate, and receiving the issues of it to his own use, then it follows that Earle & Perkins, creditors of Bird, and purchasers from him of their interests in the crops produced on their estate, and that, too, in settlement of Bird's private debt to them, will themselves be held accountable as trustees of the infants to the extent of the value of the property received by them from W. C. Bird. See Perry on Trusts, Sec. 814, and addenda Id., Sec. 810-11-12; 14 Allen, 523; 13 Id., 50, 707; 10 Mass., 388; Perry on Trusts, Sec. 225, 812; 1 Vesey, 173; 7 Vesey, 152; 14 Vesey, 362; 17 Vesey, 155; 14 Ohio, State, 445; 2 Vernon, 616; 4 Madd., 388; 7 Ala., 906; 7 Ired. Eq., 231; 5 Md., 219; 2 McCord Chy., 149; 1 McCord Chy., 119.

Courts of chancery have no inherent jurisdiction to change the character of the estate of infants. This authority they get only from the statutes, and hence they must pursue it strictly. 4 Comstock, 257; 6 Hill, 415; 1 Kern., 547; 8

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Howard, 531; 3 Lead. Cases in Eq., 269; 18 Gratt. Hence the interlocutory order of the court to the referee to sell the land to the defendant, W. C. Bird, made in 1870, was null and void, and conferred no title on Bird, especially as he never paid the price fixed by the court; and besides, the order was to sell to him if he desired to purchase according to the terms of the agreement, which was wanting in mutuality.

Papy & Raney for Appellees.

WESTCOTT, J., delivered the opinion of the court.

This case was heard and determined in connection with the case of D. B. Bird, et al., vs. Earle & Perkins and W. C. Bird, in the court below. It was heard in the same manner here upon appeal. In the case reported just before this, the court has determined the former case.

This is a bill brought by Earle & Perkins against W. C. Bird, to foreclose a mortgage executed by him upon his crops for the year 1873, to secure sums of money then due and to become due to them, against Theodore Turnbull, and M. E. Ames, administratrix of C. B. Ames, deceased. The two last named parties claimed to be judgment creditors of Bird—one for seventy-five dollars, the other for one hundred and ninety-five dollars. They had caused executions to issue, and had levied upon the equity of redemption of the mortgagor, Bird, in these crops. The bill was filed on the 5th of January, A. D. 1874. Plaintiffs prayed an injunction against the judgment creditors restraining any further proceedings under their levies, and for a decree of foreclosure and sale against Bird. The mortgage was filed as an exhibit to the bill. Upon default of Bird, there was an order entered, on the 11th January, A. D. 1874, that the bill be taken *pro confesso*. The result of this default was, as to Bird, that the cause should be proceeded in *es-*

parte, and the matter of the bill be decreed, if it could be done without an answer, and was proper to be decreed.

At this point in the proceedings, the children of P. B. Bird and Daniel B. Bird, who had already brought their original suit against Earle & Perkins, filed a petition setting up the pendency of their former suit against W. C. Bird and Earle & Perkins, alleging ownership of two-thirds of the land in the possession of W. C. Bird, and claiming a like interest in the crops. The object of the petitioners, as stated by them, was that they might be given an opportunity to be heard in the matter before a decree of foreclosure was passed, an injunction granted, or receiver appointed in this suit, and to the end that they might be made parties defendants in this action.

On the 10th of January, A. D. 1874, after notice, Thomas J. Perkins, one of the plaintiffs herein, was appointed receiver of the crops, with directions to sell the same. On the 2d of March, A. D. 1874, these defendants file an answer, and subsequently an amended answer. They do not expressly deny the existence of the mortgage from Bird to Earle & Perkins, nor do they deny the existence of an indebtedness secured by a mortgage upon these crops. They allege that they are the owners of one-third of the crops produced, and seek to charge Earle & Perkins as trustees. They set up substantially the same facts that they had already set up in their bill against Earle & Perkins. In addition to their claim against Earle & Perkins, they make a claim for rent, and, as infants, they claim the benefit of a general denial of all the allegations of the bill, and insist upon strict proof. To these answers plaintiffs filed a replication. Defendant Bird then files an admission that he owes Earle & Perkins, under their mortgages, the sum of ten thousand three hundred and twenty-four dollars. The infant defendants introduce evidence of their title as tenants in common with Bird, and an extract from a former bill of Earle & Perkins, filed March 5, 1873, from which it appears

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that Earle & Perkins were at that time aware that W. Bird had only one-third interest in the land as tenant common with them. This was after the execution by Bird of the mortgage to them, the mortgage being dated the 7 of February, A. D. 1873. On the 8th of December, A. D. 1874, the case was heard upon the pleadings and evidence in this case, and upon the pleadings and evidence in the case of D. B. Bird *et al.*, against Earle & Perkins, the agreement of counsel being that both these actions "should be heard and determined upon the record, and evidence submitted in both cases," the court decreed a foreclosure of the mortgage, directed the receiver to apply the proceeds of the sales of the crops to the mortgage debt of the plaintiffs, and dismissed the bill as to these defendants. From this decree this appeal is prosecuted. The position of the appellants here is very peculiar. They argue the case as though they are entitled to affirmative relief upon answer without cross bill, and also seek to make their answer in this suit available as proof of their affirmative allegations in their own original suit.

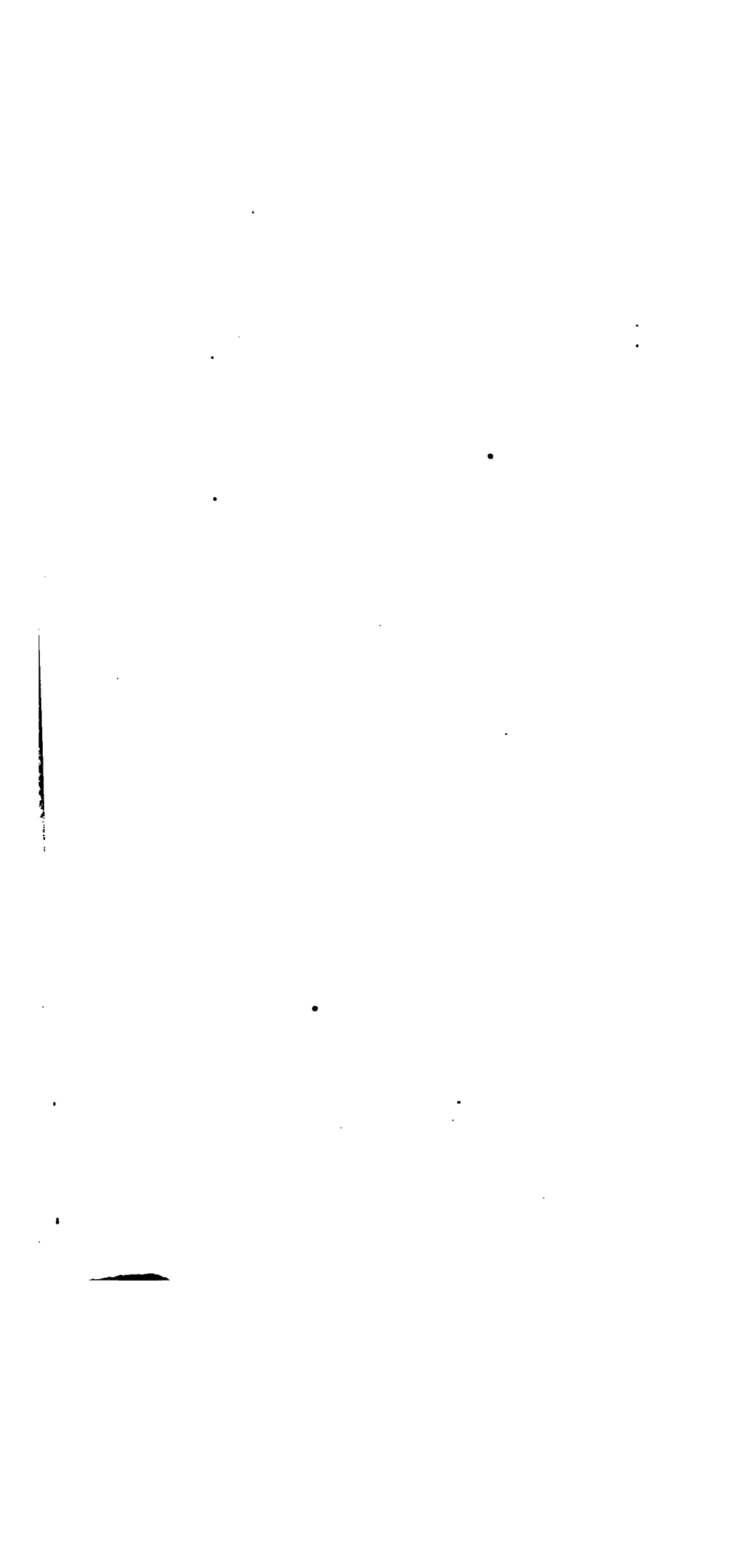
The plaintiffs in this suit admit the tenancy in common of the land of the defendants, D. B. Bird *et al.*, with W. C. Bird, their mortgagor. The plaintiffs in the other suit, D. B. Bird *et al.*, admit the existence of the mortgage and a mortgage debt. The mortgagor, Bird, admits it also in this suit, and gives the amount, and the mortgage is an exhibit to the bill. The result is that from the pleadings in both of the cases, the proof is that the parties were tenants in common of the land, and that Earle & Perkins were mortgagees of the crops raised thereon by the use, occupation and labor of one of the co-tenants. In the preceding case we have discussed this question at length. The decree of foreclosure in this suit was proper, and must, therefore, be affirmed.

Something was said in the presentation of this case as to a landlord's lien upon these crops. As to that it is enough

to say that the relation of landlord and tenant does not exist between one tenant in common and the other tenants in common, where the one occupies the common estate in his own right, and without contract, express or implied, with his co-tenants.

It was also objected that one of the parties was appointed receiver in this case. As a general rule this is wrong, but these defendants having no equity or claim as to the crops of which he was appointed such receiver, cannot be heard to object to it. In addition to this the case has reached a final decree, and it must be affirmed or reversed by a consideration of all the equities of the parties. The final decree, if correct, cannot be reversed for the appointment of an improper person as receiver.

The decree is affirmed.



DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, 1876.

DANIEL P. HOLLAND, APPELLANT, VS. THE STATE OF FLORIDA, ET AL., RESPONDENTS.

1. The general rule is, that the plaintiff in execution, purchasing at a sale under his execution, takes the property subject to such prior liens and equities as affected it in the hands of the defendant in execution when the judgment was recovered. This rule applies to the sale of a franchise under a statutory power.
2. The Constitution of the State of Florida grants the power to the Legislature to issue bonds to perfect a system of internal improvements, embracing well-defined lines of railway in process of construction. The Constitution limits, also, the power of taxation. Any further power in reference to internal improvements is not necessary or essential to the purposes of government; such grant is a limitation upon the power of the Legislature in the matter of granting aid to railways. Where the constitution of a State grants the power to the Legislature to issue bonds for specified purposes, such grant is, under the circumstances stated, a limitation of the power when exercised in reference to those purposes.
3. A limitation upon the power of the Legislature in the matter of pledging the credit of the State to aid *quasi* public works, such as railways, should be strictly construed, and an act of the Legislature authorising an issue of State bonds in aid of a line of railway differing essentially and fundamentally from the line to which the power thus to aid was limited by the Constitution, is in this respect unconstitutional and void.
4. Where the line to which aid was authorized to be extended by the Constitution was part of a *State system*, having its several termini at points within the State, a line of railway, embracing a part of the

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system but having one of its terminal points on the boundary line of another State, looking to a connection with the ports of another State, is a line of railway essentially and fundamentally differing from the line to which aid was authorized to be extended.

5. Under the provisions of the act of the Legislature authorizing an exchange of State bonds with certain railroad companies, the State was to occupy two relations to those who bought its bonds from the company. The first was that of a debtor to the holder, and the second was that of a trustee holding the bond of the company and the lien created by the act to secure payment to the party who advanced money to the company. The Legislature had no authority to create the first relation. It did have power to enact the second.
6. The State is prohibited by the Constitution from becoming "a joint owner or stockholder in any company, association or corporation." The State may grant such franchises to others. She cannot herself purchase, own, or operate a line of railway.

Appeal from Duval Circuit Court, Fourth Judicial Circuit.

The points in this case are fully explained in the briefs of counsel and the opinion of the court.

D. P. Holland in his own right and counsel for appellant.

This is an appeal from a decretal order made by the Judge of the Fourth Judicial Circuit, Duval Circuit Court, sustaining the demurrer of the plaintiffs to the answer of the defendant, Daniel P. Holland.

From this order, Holland appeals to this court, and assigns the following as error:

1. That the court below erred in sustaining the demurrer of the plaintiffs to the answer of defendant Holland.
2. That the complaints in this action do not state facts sufficient to constitute a cause of action. And that the said action should be dismissed for the reasons aforesaid.

This was an action commenced under the Code for equitable relief by the plaintiffs, against the Jacksonville, Pensacola & Mobile Railroad Company and others, in March, 1872, who prayed judgment for \$572,000 and costs against

said company for a balance claimed to be due the Trustees of the Internal Improvement Fund on a sale of the Pensacola and Georgia Railroad, and the Tallahassee Railroad, in March, 1869, by the Trustees of the Internal Improvement Fund, at which sale one Dibble and associates were the purchasers; and also for injunction restraining the defendants from selling or disposing of railroad stock in that company and in the Florida Central Railroad Company, and for a receiver.

On this complaint the court appointed one Greeley a receiver of the whole line of railroad from Jacksonville to Chattahoochee, and from Tallahassee to St. Marks, and the receiver took possession.

In June, 1872, plaintiffs amended their complaint. And over two years thereafter to-wit: on the 24th day of March, 1874, plaintiffs filed an supplemental complaint, and made Daniel P. Holland a defendant, Holland being at this time in possession of and operating the railroad west of Lake City, and claiming title thereto by virtue of a conveyance made to him as purchaser at a judicial sale by the United States Marshal by virtue of an execution issued against said Jacksonville, Pensacola & Mobile Railroad Company in favor of said Holland, at which sale Holland was the purchaser; and while he, Holland, was thus in possession, the plaintiffs filed their supplemental complaint, made him a party defendant to said action, obtained various orders against him, and forcibly dispossessed Holland under so-called writs of assistance, and put said Greeley in the possession of said railroads, and obtained a judgment in favor of the Trustees. All of which orders, as well as the original order appointing Greeley receiver, were by this court vacated and set aside, and the cause remanded to the Duval Circuit Court "to be heard on the issues made, or to be made by the pleadings, and for such other disposition as is conformable to law."

After the mandate of this court, Holland, on the first of

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May, 1875, filed his answer to said action, to which answer the State of Florida demurred, on the ground "that said answer does not state facts sufficient to constitute any defence in law. Whereupon, and for divers other good causes of demurrer appearing upon the face of said answer, the plaintiffs pray judgment, &c."

This demurrer was sustained by the court—and from this decretal order Holland appeals to this court.

The complaints allege—

1. That the Trustees of the Internal Improvement Fund sold the Pensacola & Georgia Railroad on the 20th March, 1869, for \$1,220,000, and the Tallahassee Railroad Company for \$195,000, and that Dibble and associates paid all the purchase money except about \$472,000, which, with interest thereon, is still due. That a check for the amount was given by the purchasers to the trustees, and by them accepted; that they then delivered the check to their fiscal agent, George W. Swepson, who receipted to the trustees for the same. That the giving and receiving of the check was a fraud.

2. That this sale was had under and by virtue of the internal improvement act of 1855.

That the purchasers, Dibble and associates, were afterwards incorporated as the Tallahassee Railroad Company, which last company afterwards consolidated with the Jacksonville, Pensacola & Mobile Railroad Company, and this last company the plaintiffs seek to obtain judgment against and a sale of the franchises and property of this railroad company to pay the balance claimed to be due on said sale by the trustees.

3. The State of Florida claims to have issued to the Jacksonville, Pensacola & Mobile Railroad Company three millions of bonds of the State of Florida, issued by virtue of the act of 1870, entitled an act to alter and amend an act to perfect the public works of this State, approved June 24th, 1869, and to have exchanged three millions of State of

Florida bonds, for three million dollars of bonds of the Jacksonville, Pensacola & Mobile Railroad Company. That said railroad bonds are now held by the State, and that interest is due and unpaid thereon from the first day of January, A. D. 1870, at eight per cent. And that the State has a first lien and mortgage on said Jacksonville, Pensacola & Mobile Railroad Company, its franchises and property, superior to all others, and that M. S. Littlefield, the President of the company, made the certificate under oath as required by the statute, and that the exchange of bonds was made with him by the State. And alleges consolidation with the Tallahassee Railroad Company, and with the Florida Central Railroad Company. Numerous other matters with great prolixity and verbiage are set out, the object of the pleader being as unascertainable by any known rule of pleading as the prayers are singular, which prayers in short are, for sale of the railroad from Jacksonville west ward, as the property of the said Jacksonville, Pensacola & Mobile Railroad Company; that all this company's property and franchise shall be sold *subject* to the right of the trustees under the act of 1855 to enforce the payment of the said balance. And a further condition that the purchaser buys the road subject to the claim of the State of Florida growing out of said exchange of securities as fully and amply as though such had not taken place.

On 24th March, 1874, plaintiffs filed "supplemental complaint and petition," making other parties defendants, and amongst them Holland is made a defendant.

This supplemental complaint alleges "that since the filing of the amended complaint and the subsequent proceedings therein, Daniel P. Holland, heretofore, to-wit: on or about the second day of December, A. D. 1872, recovered a judgment against the Jacksonville, Pensacola & Mobile Railroad Company, hereinafter called the defendant company, in the Circuit Court of the United States, Northern District of Florida, for the sum of about sixty thousand dollars, and

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caused executions to issue thereon, and the same to be levied upon the equity of redemption of this railroad and appurtenances of said defendant company lying west of Lake City, Columbia county, and that on the first Monday of May, A. D. 1873, the marshal of the United States sold said property so levied on, and that said Daniel P. Holland became the purchaser.

"2. That said Holland at such sale paid no consideration for the property purchased, but that the amount of his bid therefor was credited upon said executions or is yet to be credited.

"3. That soon after such purchase said Holland acquired possession of the said railroad of defendant company, and rolling stock, and appurtenances, situated west of Lake City aforesaid, and has ever since retained possession thereof, and received the income and tolls thereof, and is now in possession thereof, receiving the rents and tolls thereof, to the great wrong and injury of plaintiffs, and in violation and contempt of the order and proceeding of this court in this case, which will more fully appear by inspection of the record thereof, reference being thereto had."

The supplemental complaint also makes the bill in the Supreme Court of the United States, and Holland's answer thereto, a part of this supplemental complaint, and alleges that Holland's actions are in violation of rights of the plaintiffs. Various other matters not connected with the suit, relative to stock and the receivership of Greeley, are set out in the supplemental complaint.

The plaintiffs then pray, "That a proper judgment and decree may be entered in favor of the plaintiffs, the Trustees of the Internal Improvement Fund of Florida, for the balance of the purchase money alleged to be due in said complaints, and in behalf of the State of Florida for interest due and unpaid on said four millions of bonds. That such other and different relief may be granted as may seem just and equitable."

And after praying for special orders against Holland and several other defendants for attachments for contempt, and other orders, and that the receiver be put in possession, (which was done, and Holland without notice or hearing forcibly dispossessed, which this court afterwards set aside and reversed,) they then pray "that said defendants may be restrained from intermeddling with such possession of said property, and the said defendants may be compelled to account for the income of said property in their possession."

Holland's answer alleges—

1. That on the 22d December, 1872, he recovered judgment in the United States Circuit Court of Florida against the Jacksonville, Pensacola & Mobile Railroad Company for the sum of \$62,233.55 and costs.

2. That execution issued thereon on the 14th December 1872, which was levied on the 10th of February, 1873, upon the equities of redemption of the railroad company, and "also upon all the right, title and interest of the said Jacksonville, Pensacola & Mobile Railroad Company, has, or is possessed of, in the franchise, railroad or railroads, rolling stock, depots, warehouses, machinery, real and personal property of any and all kinds whatsoever, lying, or being, or situated in the said Northern District of Florida."

3. That on the 5th of May, the marshal, having first complied with all the requirements of law, sold by virtue of the execution the property set forth in the levies, and the same was knocked down to Holland, he being the best and highest bidder, for \$20,000, which Holland receipted to the Marshal for to apply to said execution in satisfaction thereof *pro tanto*. That Holland paid more than \$300 costs.

4. That the marshal made and delivered a deed to the property to Holland, which deed is copied and made a part of the answer.

5. That subsequently Holland entered into the full possession and control of the property, so conveyed to him by

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the marshal, until he was dispossessed by forcible execution writs, issued in this action.

6. That he is the legal, equitable, real and absolute owner of all the railroads mentioned in the complaints, between Lake City and Quincy, Tallahassee and St. Marks, and the Monticello branch, and of the franchises and property and things so sold to him.


7. And that he is advised by counsel that the same is not, nor is there any part thereof subject to any lien or encumbrance, stated, indicated or set forth by or in any of the complaints in this action, and that none of the bonds mentioned in this action constitute any lien or charge on the property purchased by Holland.

And on information and belief, he alleges and charges that none of the bonds or coupons indicated or mentioned in this action are, or constitute any lien, charge or encumbrance on the property bought by him, either prior or subsequent to the right, interest or title that this defendant acquired at and by the sale aforesaid.

8. On information and belief, that the Jacksonville, Pensacola & Mobile Railroad Company never executed any mortgage or deed of trust to the State of Florida upon the property purchased by Holland to secure any of the bonds mentioned in this action, and as advised by counsel that the mere execution and delivery to the State of Florida of the bonds described in the action, did not create any lien or encumbrance on the property Holland purchased.

9. That the State of Florida has no legal or equitable lien on said property so purchased, or on any part or portion thereof, but only a general, unsecured indebtedness against the railroad company.

10. That all said bonds, pretended to be issued by said company, "are absolutely null and void," by reason that there was no constitutional authority to issue said bonds, which are alleged to have been exchanged by the State for said company's bonds, and therefore said bonds are void,



and that said State has given no consideration for, and acquired no rights or interest in the bonds so alleged to have been issued by said company.

11. That the statute provided that the bonds and coupons should be payable at such place as the Governor should designate in the city of New York. And defendant says on information and belief, that the Governor has never designated any such place where they were to be, or could be paid, and submits that until such place be designated, no default can be alleged against the company.

12. On information and belief, that in point of fact all the interest called for and payable on said bonds issued by the railroad company, or the coupons, and until after the commencement of this action, has been paid by said railroad company, and therefore the railroad company was not in default when this action was commenced. That if any of the bonds or coupons maturing before commencement of this action are now in possession of the State, they ought to be delivered up and cancelled, the said company having paid the corresponding coupons on said State bonds, which in equity amounts to a payment of said coupons on said company's bonds.

13. That on information and belief, no part of the consideration money of the purchase made by Dibble and associates remains due and unpaid, but that Dibble and associates paid in full the sum which they bid at the sale mentioned, by which they became the purchasers.

14. Denies all fraud, combination, &c.

15. Denies that Greeley ever was receiver of any part of the property purchased by defendant, because the court had no jurisdiction to appoint a receiver.

16. That at the time of the levy and sale to Holland, the property was "in the actual possession of, operated and managed by the said railroad company, and was not in the actual or constructive possession of any receiver of any court

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having jurisdiction over the property purchased by defendant."

17. Defendant admits the corporate existence of the Jacksonville, Pensacola & Mobile Railroad Company, and that it acquired the road east of Quincy by consolidation with the Tallahassee Railroad Company, and also by purchase from one John B. Clark.

18. On information and belief, that the State of Florida, never in law or legal effect, ever issued or delivered said State bonds so called, and therefore never exchanged any State bonds with said railroad company.

19. And that the said Jacksonville, Pensacola & Mobile Railroad Company was not indebted to said State of Florida at the commencement of this suit.

20. On information and belief, that the President of said Jacksonville, Pensacola & Mobile Railroad Company never made the certificate under oath as required by the act of 1870, without which no State bond could lawfully be delivered to the said railroad company, or the State receive a consideration therefor any bond of said railroad company.

21. Denies every allegation set out against defendant to affect the rights and title of this defendant, not particularly before mentioned or denied, and prays that he be dismissed, and recover judgment of this court.

It is contended by the appellant, that the demurrer admits the facts in the answer—the facts thus admitted being, in short, that Holland by deed acquired and took possession of the franchises and property of the Jacksonville, Pensacola & Mobile Railroad Company in the deed mentioned; said deed being executed by the marshal, by virtue of an execution sale made in accordance with the requirements of law first had from a court of competent jurisdiction over the persons and subject matter to satisfy a judgment; and by virtue of an execution issued and levied in accordance with law, and a sale made thereunder in accordance with law, at which sale Holland became the pur-

chaser, received the deed of the office, paid the consideration or bid, entered into the possession and operated the roads, using and enjoying the franchises and property until dispossessed by writs from the court, which were afterwards declared nullities by the Supreme Court of the State, and Holland's possession thus declared to be still continuous, the act of dispossessing being done by an officer without jurisdiction.

The first question that arises from the pleadings is, did Holland by the deed of the marshal, and the sale under execution, acquire any title, and if so, what?

1. There can be no doubt but he had by these pleadings one title, to-wit: possession, or the title which is acquired by possession.

2. It is contended that Holland thereby acquired all the right, title and interest of the defendant, the Jacksonville, Pensacola & Mobile Railroad Company, in and to the franchises, real and personal property, railroads, &c., described in the deed, as fully and completely as they were owned and possessed by the railroad company and its stockholders on the day of the execution of the deed, the 11th May, 1873, and also as fully and completely as if the said railroad company and its stockholders had for valuable consideration sold, and by deed conveyed in fee simple, under their corporate seal, the franchises and property, rights and credits of the said company enumerated in the deed.

3. That the deed of the marshal relates back to the date of the judgment, to-wit: the 2d day of December, (A. D. 1872,) One Thousand Eight Hundred and Seventy-Two; and thereby from said date avoids as against Holland, the purchaser, all intermediate or subsequent liens, or alienations.

We must look to the statutes of Florida and to this execution for the power of the writ, to see whether this corporations' property, described in the deed, could be sold and conveyed by the marshal.

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Holland obtained judgment at Jacksonville, Florida, against the Jacksonville, Pensacola & Mobile Railroad Company, in the United States Circuit Court, Fifth Circuit, on the 2d of December, 1872, for the sum of \$62,233.33, on which execution issued on the 14th day of December, 1872.

The writ commanded the marshal "that he levy upon the goods and chattels and equities of redemption of the said defendant, the Jacksonville, Pensacola & Mobile Railroad Company, liable to levy and sale under execution in your district, and of the lands and tenements in your district, whereof the said defendant was seized on the aforesaid day of the entry of said judgment, or at any time since in whose hands soever the same may be."

By virtue of this writ the marshal levied on the 14th of February, 1873—

1. "On the equities of redemption of the defendant company in and to its franchise, railroads, rolling stock, machinery, depots, warehouses, real and personal property of every kind and character, situated and being in the Northern District of Florida, owned by, or belonging to the Jacksonville, Pensacola & Mobile Railroad Company."

2. "Also the equities of redemption of the company in and to the railroads, and parts of road, from Lake City to Quincy, and from Tallahassee to St. Marks, together with the workshops, rolling stock, machinery, depots, real and personal property of every kind and character, acquired by the said Jacksonville, Pensacola & Mobile Railroad Company by consolidation with a corporation known as the Tallahassee Railroad Company, or by purchase from one John B. Clark, or from any other person or persons."

3. "Also all the right, title and interest of the said Jacksonville, Pensacola & Mobile Railroad Company has, or is possessed of in the franchise, railroad or railroads, rolling stock, depots, warehouses, machinery, real and personal property of any and all kinds whatsoever, lying and being or situated in the Northern District of Florida."

The property thus described and levied upon was sold by the marshal on the 5th of May, 1873, Holland becoming the purchaser, crediting his bid on the execution; the marshal conveying by deed the above described property mentioned in the levy to Holland, who afterwards entered into possession.

I. It is contended that by virtue thereof, Holland acquired all the right, title and interest of the Jacksonville, Pensacola & Mobile Railroad Company in and to its franchise, real and personal property, and the equities of redemption of said company, together with all the property of every kind of said company.

Holland's judgment was a lien on the real estate of the defendant company from the day of its rendition, to-wit: the 2d December, 1872, and on the personal property of the corporation from the time the execution came to the hands of the marshal, to-wit: the 14th December, 1872.

The statute of Florida governing the same is as follows: "Every judgment at law and decree in equity, which shall be entered and pronounced in any of the courts of the State, shall create a lien, and be binding upon the real estate of the defendant or defendants." Thomp. Dig. p. 351-2; 3 Fla. 196-7.

II. The property of this corporation was liable to levy and sale under execution.

The statute of Florida is in the following words: "If any judgment at law, or decree in chancery, shall be rendered against any corporation, it shall be lawful for the plaintiff to sue out either a *distrain*, or *fi. fa.*, or *elegit*, as he may think proper, and the said writs of *fi. fa.* and *elegit* may be levied as well on the current money as on the goods and chattels of said corporation." Thomp. Dig. p. 354.

This act was passed in 1834, at which time realty was not liable to be sold under execution. The first part of this statute gave the writ of *fi. fa.* against corporations; the

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last part of the section extended the powers of the writ so as to reach the current money of corporations, thereby increasing the powers of the writ. Ten years thereafter, to-wit: in 1844, the powers of this writ were extended in the words of the statute as follows: Lands and tenements, goods and chattels, shall be subject to the payment of debts, and shall be liable to be taken in execution and sold. *Thomp. Dig.* p. 355.

One year thereafter, to-wit: in 1845, the power of this writ was still further extended, viz.: "From and after the passage of this act, equities of redemption, or the legal right of redemption, in real and personal property, shall be subject to levy and sale under executions upon judgment at common law, or upon decrees in equity." *Thomp. Dig.* p. 355.

Thus we see that by the statutes of Florida, the writ of *facias* was authorized to issue upon judgments rendered against corporations, and that the equities of redemption, goods and chattels, real and personal property of corporations, were liable to levy and sale under execution for the satisfaction of debts.

It also appears from the form and mandate of the execution issued in this case by the United States Circuit Court, that the court had issued this writ in conformity with the State practice and statutes as to writs of execution; the power to do which has been well settled by numerous authorities of the Supreme Court of the United States.

III. The Jacksonville, Pensacola & Mobile Railroad Company, by statute, held all its property, real and personal, in fee simple, and was authorized to sell the same in fee, or for a less estate, or by way of mortgage, or otherwise. It follows, therefore, that whatsoever property, right, title or interest the company could voluntarily sell, dispose of, convey by deed, the marshal could, by virtue of said execution, sell and convey, and the purchaser would take.

1st. The Jacksonville, Pensacola & Mobile Railroad (

pany was created by a public statute of Florida, entitled "an act to perfect the public works of the State," approved June 24th, 1869. This statute was amended in 1870 by an act entitled "an act to alter and amend an act entitled an act to perfect the public works of the State," approved January 28th, 1870. From these statutes we find the powers, authority and liability of the defendant company.

The first section of the act of 1869 commences by declaring the object for which the Legislature created this corporation, to-wit: "Section 1. In order to secure the speedy completion, equipping, and the maintenance of a connection by railroad between Jacksonville, on the Atlantic coast, and Pensacola, on the Gulf coast, and Mobile, in Alabama, running through the State of Florida," certain persons mentioned in the act, "their associates, successors and assigns, are hereby constituted a body politic and corporate, under the name of the Jacksonville, Pensacola & Mobile Railroad Company."

The act proceeds to confer on them certain powers, and among others this power, in the following words: "May purchase and hold real and personal property, which may be necessary or useful for the purposes of the road, and sell and convey the same in fee, or for a less estate, or by way of mortgage, or otherwise." See Sec. 1, Act 1869.

The seventh section authorizes the company to hold all real property acquired by condemnation and donation in fee.

"Sec. 7. The property so assessed and paid for by said railroad company, in conformity to the provisions of this act, and all donations from any source for the same, shall forever afterwards belong to and become the property of said railroad company, its successors, in fee simple."

This company differs from all other corporations in this, 1st, that instead of an easement, the company held its property in fee, both real and personal, with power "to sell and convey the same in fee, or for a less estate, or by way of mortgage, or otherwise." 2d. That the corporate powers

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and privileges, under the corporate name, were not only given to the individual persons mentioned in the act, but also to their associates, successors, and not only to them, but to "their assigns." Hence, the act specially vested all the corporate powers, franchises and privileges in the assignees, whether the estate conveyed was in fee or for a term of years, or otherwise.

This company, in order to accomplish the object of its creation, had two great powers. 1st. To build and operate a road west from Quincy to Mobile; the line of this road was designated in the 4th section of the act; this line of road was subsequently changed by the first section of the amendatory act of 1870, which prescribed that the company should "have the exclusive right for twenty years to build a railroad with one or more tracks from the terminus of the late Pensacola and Georgia Railroad, now the Tallahassee Railroad, at Quincy, Gadsden county, to the dividing line between the States of Florida and Alabama, in the direction of the city of Mobile, Alabama, running through the counties of Gadsden, Jackson, Holmes, Washington, Walton, Santa Rosa and Escambia, crossing the Pensacola & Louisville Railroad, with privilege of continuing the same to Mobile and of connecting with any railroad running to Mobile. Provided, however, that in the construction of said railroad, the line west of the Chattahoochee river shall not in any instance be run or the road built nearer than fifteen miles of the north line of the State of Florida." 2d. It might acquire, by consolidation, the roads and property of the several companies east of Quincy, which was authorized by the 14th section of the act of 1869.

Subsequently, in 1870, the corporation then owning and operating the roads between Quincy and Lake City, Tallahassee and St. Marks, called the Tallahassee Railroad Company, was consolidated with the said defendant corporation by virtue of said 14th section of the act of 1869, and, in the

words of the statute, "became one corporation under its name." See Section 14, Act 1869.

This corporation, called the Tallahassee Railroad Company, was incorporated the same day as the defendant company by a statute entitled "an act for the relief of Franklin Dibble, A. Huling, E. M. Cheney, and their associates, purchasers of the railroad from Tallahassee to St. Marks, and of the railroad from Quincy to Lake City, and incorporating the Tallahassee Railroad Company," approved June 24, 1869.

The 1st section of this act declares that the persons mentioned therein, "and their associates, and their successors and assigns, are hereby made a body politic and corporate, under the name of the Tallahassee Railroad Company, and they, their associates and assigns, as such body politic and corporate, are hereby vested with and shall be entitled to exercise and enjoy the like powers, franchises and privileges as were granted to the Pensacola & Georgia Railroad Company and the Tallahassee Railroad Company by the several acts incorporating the said Pensacola & Georgia Railroad Company and said Tallahassee Railroad Company, and with the right to hold, operate and enjoy the said railroads, under the name of the Tallahassee Railroad Company, subject to the conditions annexed to the sale of said roads by the Trustees of the Internal Improvement Fund, and by and in the name of the Tallahassee Railroad Company, they, their associates, successors and assigns, may purchase, receive and hold lands and tenements, goods and chattels of whatsoever character that shall be necessary or useful for the purposes of said railroads, and the same to grant, sell, mortgage or dispose of," &c. See Section 1, Act 1869.

The 4th section gives special powers of selling and leasing, with the limitations therein as follows:

"SEC. 4. *Be it further enacted*, That said Tallahassee Railroad Company may, when they shall see fit, rent, lease, farm out, or sell any part of the said railroads to any person or persons, corporation or corporations, upon such terms as

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may be agreed upon, provided said sale, renting or leasing shall not be made to any person or persons or corporation owning any railroads out of the State of Florida."

These two statutes, passed at the same session of the Legislature, approved the same day, having reference to the same subject, to-wit: a line of railroad running through the northern portion of the State of Florida, from Jacksonville towards Mobile, Ala., which line, at the time of the passage of these statutes, was partly completed and then operated as follows: That part of the line from Jacksonville to Lake City, a distance of 60 miles, by the Florida Central Railroad Company, and the remaining completed portion from Lake City to Quincy, 138 miles, and from Tallahassee to St. Marks, 20 miles, being operated by Dibble and associates, who had purchased the said roads, are to be taken and construed together; for the "act to perfect the public works of the State," approved at the same day as the act which incorporated Dibble and associates under the new name of the Tallahassee Railroad Company, declares the object and intent to be to secure to the public the line of railway to be completed and operated through the whole northern part of the State, and to be exclusively confined to Florida interests; and for this purpose these statutes created the defendant corporation to complete the road westward from Quincy, but prohibited the company from building the road nearer the northern boundary of the State of Florida than 15 miles, and incorporated Dibble and associates under the name of the Tallahassee Railroad Company, with new powers, among others with the right to sell or lease the completed roads east of Quincy, but prohibiting them from selling or leasing the roads to any "persons or corporation owning any railroads out of the State of Florida," and giving these two railroad companies the power of consolidation, and also granting the franchises and privileges of both companies not only to the original corporators and their successors and associates, but also to their "assigns." And also giving

each company the power to hold all real and personal property "necessary or useful for the purposes of the road," (which term, necessary, includes all real and personal property required for the construction of the road-bed, the superstructure, depots, and equipments, both real and personal, required to create, operate and maintain the roads,) and "to grant, sell, mortgage, or dispose of" the same, and in the words of the charter of the Tallahassee Railroad Company, and in the words of the public act which created the defendant company, to "purchase and hold real and personal property, which may be necessary or useful for the purposes of the road, and sell and convey the same in fee or for less estate, or by way of mortgage or otherwise."

It is evident from the words of the statute, and the whole scope of these acts, that the prime object of the Legislature was to complete this unfinished link through the State towards Mobile; to locate the same within her own territory so far from Georgia and Alabama as to make this line of railway an exclusive road for the State of Florida interests, and not to allow the roads to be owned by citizens or corporations owning railroads in other States, for fear of thereby injuring the business of Florida which this line was intended to advance, and which had its origin as far back as the year of 1855, under an act which created a railroad system for Florida, commonly called the internal improvement act. This act of 1855 was the parent statute of all the other railroad acts of Florida, and designated this line of railway on the 4th section of the act, in which it will be found the State placed the public domain in trust for certain objects, among others to aid in the construction of this line of railway; and provided that any companies then chartered, or that might hereafter be chartered, whose routes were within the line laid down in the 4th section of that act, might obtain the benefits of the act, thus giving its aid to any who would build the line or any part thereof. And by the 24th section jealously guarding the line from

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foreign railroad interests by prohibiting, without the assent of all the railroad companies enjoying the benefits of the act, and the trustees created by the act, the road to be built to the northern boundary of the State west of the Alapaha river.

Therefore, the whole scope of the Legislature of Florida shows that the franchises she granted for the main line of road were not to be confined to the certain few either then owning franchises in 1855 or those designated in the act of 1869, but to any person or persons or corporation other than those owning foreign railroads who would build and operate this main line, either that which was completed in 1869 or remained to be built. Hence the State granted these franchises to the corporations, their successors, associates and assigns, and gave them the power to sell, lease, or otherwise dispose of the same, it being immaterial to the State who possessed these franchises and privileges and property so long as they, by ownership, were not interested in foreign railroads, provided thereby the State of Florida could obtain the benefits of this line of railway running through the northern portion of the State, connecting thereby the Gulf and the Atlantic; for this intent is evident from the general object of the statutes and the words used. These franchises and privileges in both cases are granted to the assigns as well as to the corporators, their successors and associates.

The word "assigns" necessarily implies the power of assignment or conveyance as it is used in those statutes. "Assigns" are those to whom rights have been transmitted by particular title, such as sale, gift, legacy, transfer or cession. Bouv. L. Dic. p. 134.

This word "assigns," came first into legal use relating to the conveyance of realty in the time of Henry I, for prior to that time the owner of lands could not sell, even that which he had purchased; but by statute of Henry I, afterwards extended by act of Henry III, if the deed specified to him, his heirs and "assigns," he might re-sell

what he had by purchase and deed thus acquired; but if the word "assigns" was not specified in the deed, he could not sell or convey even that which he had purchased. 2 Black. Com. p. 289.

Hammond on Parties, page 117, says: "When the lord assigns the reversion, the assignee becomes lord in his room, fills the precise situation and character the other filled and was clothed with, and is therefore entitled to the privileges annexed to that character."

In Hatley vs. Scott, Lofftus Reports, page 318, which was before Lord Mansfield, Mr. Bancroft said, "with respect to the term assigns there was no definition, as being too clear to need or admit one; however, I may take for granted by way of definition, that an assign is one who can take an assignment from a person qualified to make it."

With the language of the statutes granting the power to sell and convey in fee, or for a less estate, can there be any question that both railroad companies were authorized by statute to voluntarily sell and convey all and every kind of property owned by the corporations, and held by them, under their respective charters; and in case of a sale, that the corporate franchises would pass to the purchaser, by the express terms of the charters, wherein the Legislature gave the franchises to the assigns. Hence, we hold, that in case of a voluntary sale made by either of the corporations, the vendee would be invested by the statute as purchaser, with all the franchises, powers and privileges of the railroad company as fully and completely as if his name was set forth in the charter in the manner in which the names of the incorporators are described, and that the purchaser, under such voluntary sale, would be in the same position as any person, who had by act of the corporators become their associate; or, who having bought out all interest of the incorporators named in the charter, had by sale become their "successors."

The defendant corporation acquired the roads east of

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Quincy, owned and operated them under the franchise of the Tallahassee Railroad Company, by consolidation.

The Supreme Court of the United States, in Tomlinson vs. Branch, 15 Wall. 465, speaking of corporations consolidated, say that while the corporate rights and franchises of the old company which appertained to its existence and functions as a corporation were merged into the new company and became extinct. "But all its rights and duties, its privileges and obligations as related to the public or to the third persons, remain and devolve upon the new company."

Hence, we see this defendant company possessed the power of sale and conveyance, not only of the franchise and property which it possessed by the act to perfect the public works, but also the franchise and property of the roads east of Quincy that it acquired from the Tallahassee Railroad Company, express power and authority to sell and convey the franchises and property having been given by both statutes to both railroad companies.

2d. What the defendant company could voluntarily sell and convey, the marshal could, by virtue of said execution, sell, and by deed convey to the purchasers each, every and all right, title and interest owned and possessed by the defendant company. Therefore, as the defendant company could, by the authority in it vested by said statutes of 1869, voluntarily sell and convey to Holland all its franchises and property acquired as aforesaid, the marshal, acting by virtue of said execution in law as the agent and attorney of the defendant company, was possessed of like power and authority.

In Lessee of Cooper vs Galbraith, 3 Washington C. C. Reports, page 550, the court said: "The sheriff is empowered by law to convey by deed to the purchaser under an execution all the right, title, interest and estate of the defendant as fully as the defendant himself, or an attorney empowered for that purpose by him, could have done. The

officer, in fact, acts as such attorney, appointed for that purpose by law. The purchase money is paid to the defendant in execution, or is applied to his use in discharge of his debt, between whom and the purchaser the law raises a contract in like manner as if the conveyance had been made by him."

In *Massey vs. Thompson*, 2 Nott & McCord 105, the court said: "The defendant ought not to be permitted to oppose the title of the purchaser. The sheriff's deed is his; he has received the consideration; it has been applied to the payment of his debts; he should be estopped. No more should he be permitted to oppose the recovery of the plaintiff than if he had signed the conveyance with his own hand."

In *McKnight vs. Gordon*, 13 Richardson's Equity, pages 230 and 240, the court, citing several cases, reaffirms the law as laid down in *Massey vs. Thompson*.

The officer selling at (the sale under execution) is constituted the agent and attorney of the execution defendant. *Rorer on Sales*, p. 27.

"And it is well settled that what an owner may sell himself may be sold on execution if there be no law to the contrary." *Rorer on Sales*, p. 349, § 1083.

Franchises are property. In the case of the *West River Bridge Company vs. Dix*, 6 Howard, Curtis's Report, vol. 16, page 805, section 541, Justice Woodberry said: "I concur in the views also that such a franchise as the incorporation is a species of property. It is a legal estate vested in the corporation. But it is often property distinct and independent of the other property in land, timber, goods, or choses in action which a corporation like a body, not artificial, may own. It is also property subject to be sold sometimes even on execution, and may be devised or inherited."

This case established the doctrine that a franchise, like any other property, might be taken under the right of

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eminent domain, condemned and sold for public use on paying just compensation to the owners.

Daniel, J., in delivering the opinion, said: "A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone. It is its character of property only which imparts to it value." And again he says: "We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property."

By the statutes of Florida both these franchises were given in express words to the "assigns" of the corporations, their successors and associates. The power to sell was given; they were made vendable and the subject of mortgage. This is an unusual power and grant of corporate privileges, but it pleased the State of Florida to thus grant and confer those privileges and none can question her authority so to do. The power of this defendant corporation, its privileges and liabilities, are derived from those statutes, and to them must we look for the validity of this sale under execution. The sale of the corporate rights, franchises and property by the marshal is the same as if the deed was voluntarily made for a valuable consideration by the Jacksonville, Pensacola & Mobile Railroad Company, under its corporate seal, to Holland, conveying its realty on the 2d of December, A. D. 1872, (the date of the judgment,) and of its franchises and personalty the date of the execution, to-wit: the 14th of December, A. D. 1872. We contend that from those dates the deed of the marshal to Holland carried title against all intermediate or subsequent liens or alienations.

"When by law the judgment is a lien on the land, — the deed on execution sale has relation back to the time of — the judgment, so as to avoid against the execution purchaser all intermediate liens and alienations." Rorer on Judicial Sales, § 809, § 786; Bac. Ab. Ex. 725; Black f. 22; 5 Ohio, 48-55; 34 Ill. 440-8.

A purchaser at a sheriff's sale takes precisely the interest which the debtor had in the property sold, subject to all outstanding equities. 6 Wallace, 116, 122.

In *James vs. Railroad Company*, 6 Wallace, page 753, the Supreme Court of the United States set aside mortgages, declared them invalid, and directed that the judgment creditors be at liberty to enforce their judgments against the railroad companies.

See, also, 15th Florida Reports, page 387, where the Supreme Court held that Holland purchased in that case all the interest of the Jacksonville, Pensacola & Mobile Railroad Company, and was not estopped by the confession of judgment given by the railroad company to the plaintiffs, Jackson & Sharp.

In *Cotton vs. Blocker*, 6 Florida, page 11, this court sustained the sale of the interest of a mortgagee made by the sheriff, "as if he had assigned the mortgage himself instead of having it sold by the sheriff." The court then said: "Blocker is their assignee and stands in the place of James Tradwell."

In *Phillips vs. Hawkins*, 1 Florida, page 270, this court held that the interest of a mortgagee may be sold under execution.

In *Morgan vs. Mason*, 20 Ohio, 401, cited by Rorer on Sales, page 274, it is laid down that "an easement incident to a mill, and to the ground on which the mill is situated for the supply of water to the mill, is in connection with the mill and premises, a subject of judgment, lien, and of execution sale. The lien of the judgment covers the land and premises, which being the principal thing draws to it all its incidents or appurtenances thereto. They together constitute one whole."

The answer in this case, and the pleadings, show that at the time of the sale, and Holland's purchase, the Jacksonville, Pensacola & Mobile Railroad Company were in the

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actual possession of the railroad, operating and managing it by the officers of the company.

Holland's purchase was subject to outstanding and superior equities, but the equities of prior dignity outstanding, if any there were, are no more disturbed by the sale and deed by the marshal, under execution to Holland, than if the defendant company had for valuable consideration sold and by deed conveyed the said property mentioned in the marshal's deed to Holland; consequently it can be no answer to this power of sale under execution in this case, to say, that thereby equities of prior lien or superior dignity to said judgment and executions in the hands of others are by the sale under execution of the franchise and property of the corporation disturbed.

3d. We have seen that by the laws of Florida execution issued against corporations, and that lands and tenements, goods and chattels, and equities of redemption, were "subject to the payment of debts and liable to be taken in execution and sold," and that even the current money of corporations was also liable to levy and sale under executions.

By what prerogative is or was this defendant corporation exempted from having its lands and tenements, goods and chattels, its equities of redemption, and its current moneys levied upon and sold under execution? It has no such special exemption in the acts by which it was created and acquired the roads either West or East of Quincy; upon the contrary, it was vested with powers by which its "assigns" were vested with all its corporate powers and privileges. It was possessed, as to the road West of Quincy, with the power to "purchase and hold real and personal property, which may be necessary or useful for the purposes of the road; and to sell and convey the same in fee, or for a less estate, or by way of mortgage or otherwise." Section 1, Act 1869. It held even the property it acquired by dona-

on and for right of way by condemnation, in fee. See section 7.

It acquired by authority of law the roads East of Quincy, owned by the Tallahassee Railroad Company, whose "assignments" were vested with all the corporate privileges granted to the corporators, their successors and associates, who were empowered to "purchase, receive and hold lands and tenements, goods and chattels, of whatsoever character that shall be necessary or useful for the purposes of said railroads, and the same to sell, grant, mortgage or dispose of." Section 1, act 1869, p. 41. And to sell, when they should see fit, rent, lease, farm out or sell any part of the said railroads, to any person or persons, corporation or corporations, excepting to persons or corporations owning any railroads out of the State of Florida. Sec. 4, act 1869, pp. 41-2.

Hence, it held all its real and personal property West and East of Quincy in fee, and could sell and dispose of the same; could convey the property in fee, or otherwise—limited alone as above, not to sell to persons or corporations owning any railroads out of the State of Florida," and confined, as to the amount and kind of property, to that which may be necessary or useful for the purposes of the road." It is not pretended that property, which was not necessary or useful for the purposes of the road," was levied upon or sold under this execution.

2. Under the general laws, "goods and chattels," and equities of redemption, or the legal right of redemption, real and personal property, the law said should be subject to levy and sale under executions upon judgments at common law and decrees in equity."

What are goods and chattels? Chattels is a very comprehensive term in our law, and includes every species of property which is not real estate or a freehold. 2 Kent Com., c. 342, p. 436; 2 Black. Sec. 386. In ancient times property was divided into lands and tenements, and heredita-

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ments on the one hand, and goods and chattels on the other. Williams on Personal Property, p. 1, Sec. 2.

Goods and chattels, says Blackstone, 2 Book, Sec. 386, includes choses in action as well as those in possession. Chattels includes all kinds of property, except the freehold or things which are parcel of it. Bouvier's Institutes, p. 184, Sec. 462.

It also includes money, valuable securities and all other personal property, and even choses in action. Bouvier's Institutes, p. 187, Sec. 470.

3. It is contended that the words lands and tenements, goods and chattels, and equities of redemption, include every species of property of every kind and character that the defendant company could acquire, or was possessed of, or held by it; and we have seen that all this property was liable to levy and sale under execution for the satisfaction of debts, and that the corporations were not exempt from having the corporate property levied upon and sold under *fi. fa.*, but so far from the laws of Florida exempting corporate property from levy and sale under execution, it not only granted the writ as against corporations and their property, but at the time the writ was thus given, to-wit: in 1834, extended the powers of this writ to reach the current moneys of corporations, when the current money of individuals was not liable to execution in Florida; for at that time the writ of execution had no more power than that conferred on it by the laws of England.

Nor is it any answer to the position contended for that, because the lands and tenements, goods and chattels, and equities of redemption, are held or acquired by virtue of a franchise, and for the purpose of a railroad, that the corporation thus endowed by the State with this grant of privileges of franchises can thereby, because possessed of the franchise, hold and retain this property from the reach of a court of common law, and keep it exempted from the power of levy and sale under execution.

In the Bank of the United States vs. Halstead, 10 Wheaton, p. 336, the court said, "an execution is the fruit and end of the suit, and is very aptly called the life of the law; the suit does not terminate with the judgment, and all proceedings on the execution are proceedings in the suit, which are expressly, by act of Congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty and a due execution of the process according to its command."

We have seen, by the mandate in the execution, the United States Circuit Court in Florida had changed and prescribed the form of the writ, and the power, authority and command of the writ to the property made liable to levy and sale under execution, according to the State laws, and this in accordance with the settled practice of United States Courts, as laid down in 10 Wheaton; 5 Peters, 210; 6 Peters, 648; 9 Peters, 329; 15 Peters, 301; 2 Howard, 608, 301.

What title does the purchaser of an equity of redemption acquire under execution? The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law. 4 Kent Com., Sec. 160-1; 1 Hilliard on Real Property, p. 460.

The purchaser of the equity of redemption takes the place of the mortgagor, with all his rights, privileges and disabilities. 4 McCord, 336.

Such a sale is effectual in passing to the purchaser all the rights of the mortgagee. 15 Pick. 32.

The purchaser of an equitable interest takes the property subject to the burden of every prior equity chargeable upon it. 7 Cranch, 34; Howard, 333; 4 Mass. 349; 2 McLean, 268.

A purchaser at a sheriff's sale of an equity of redemption succeeds to the rights of the judgment plaintiff, and may

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redeem against a prior incumbrance before foreclosure and sale, although he or the judgment plaintiff may have been a party to the suit for foreclosure. 26 Indiana, 220.

By sale of the equity of redemption the whole property of the debtor is taken from him. 1 Hilliard on Real Property, p. 463.

But not only was the equity of redemption sold and purchased by Holland, but also all the right, title and interest of the Jacksonville, Pensacola & Mobile Railroad Company in and to its franchise, railroads, depots, warehouses, machinery, and property of every kind, lying and being in the Northern District of Florida. See the answer, levies and deed of the marshal, so that even if there was no equity of redemption sold, the interest of the railroad company, in all its property in the levy described, was sold. But the appellees are trying to force the question that Holland only sold the equities of redemption. That is not true. The record shows that Holland also purchased all the interest of the Jacksonville, Pensacola & Mobile Railroad Company. The words of the levy and deed are the same as if the company had conveyed by deed their interest to Holland.

We contend, therefore, that the foregoing authorities show that Holland acquired by the sale and became the owner of, not only the equity of redemption, but also of all the right, title and interest formerly owned, belonging to and possessed by the Jacksonville, Pensacola & Mobile Railroad Company, in and to its railroad and property of every kind, real and personal, as fully and completely by the deed of the marshal, as if the stockholders, each and every one had, for valuable consideration, sold the same to Holland, and the Directors, President and Secretary, under the corporate seal of the company had, by their order, executed and delivered a deed conveying all of their interest in said property to Holland, and that by said sale the corporate rights, privileges and franchises were, by the terms of the charter, then vested in Holland, he

being the assignee of the stockholders, associates, or successors of the original incorporators.

Having shown that Holland acquired all the right, title and interest of the Jacksonville, Pensacola & Mobile Railroad Company, I now propose to take up the case made by the plaintiffs and the pleadings.

We contend that the demurrer of the answer permits the appellant to attack the complaints, and show that the complaint does not state facts sufficient to constitute a cause of action. Vorhies' Code, p. 236, note e.

The demand of the trustees is that they have a lien of superior dignity to all others for \$472,000, and interest being an unpaid balance due for the roads West of Lake City, sold to Dibble and associates by the trustees in 1869.

The answer to this is: 1st. That even if the same was due they cannot recover the same from the Jacksonville, Pensacola & Mobile Railroad Company, because this is especially forbidden by the 15th section of the act of 1869, which prohibited the defendant company from being responsible for the obligations of the old company. This corporation could not assume the debt if due, even if they would. The trustees must look to Dibble and associates, or to the Tallahassee Railroad Company, but they cannot reach the property of the defendant corporation.

2d. The Jacksonville, Pensacola & Mobile Railroad Company was not in existence when this transaction took place, and could not therefore have had notice.

3d. The Legislature in the charter of the Tallahassee Railroad Company ratified and confirmed the sale by the trustees. Act incorporating the Tallahassee Railroad Company.

Therefore, the Jacksonville, Pensacola & Mobile Railroad Company, when it consolidated with the Tallahassee Railroad Company, had the right to presume and believe the same was paid for, and that there was no lien of the trustees

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thereon; and therefore stand in the place of innocent purchasers, without notice.

4th. But the facts alleged in the original complaint show that the trustees cannot set up the vendor's lien, because they waived the same by the acceptance of a check of parties other than Dibble and associates, and also by turning their check over to their fiscal agent, Swepson, who receipted to them for the same as cash; this doctrine has been twice laid down by this court. 3 Fla. p. 70-1; 2 Fla. p. 471.

And it will be perceived that the trustees do not aver that the check was then worthless, but that it now is; and they show no steps taken by them from March, 1869, to March, 1872, to recover the same, but wait for three years, when two corporations have been created, and one has acquired this property by consolidation and invested vast sums of money therein, and then propose to take, not only this property that was then sold, but the franchise and all the property of another corporation. Is this equity? What of their laches—what of the equities of judgment creditors—are all these to be set aside on the facts stated in the complaints? Suppose that the trustees had collected this bid in cash and spent the money, could they afterwards recover the property from the Jacksonville, Pensacola & Mobile Railroad Company, or from Holland? Where is the difference between cash, and a check, and a receipt of their own agent, either of which they could have converted into cash?

The Claim of the State of Florida.

The State of Florida claims to have a lien of superior dignity to all others, by virtue of being the holder of three millions of bonds, said to be issued by the Jacksonville, Pensacola & Mobile Railroad Company, and for which the Governor of the State issued and delivered to the President of said railroad company a like number of bonds of the State of Florida, under the act of 1870.

By virtue of this demand this plaintiff prays for judg-

ment for the interest said to be due thereon from the 1st January, A. D. 1870, and seeks to obtain a decree against Holland perpetually restraining him from intermeddling with such possession, and that he may be compelled to account for the income of said property in his possession.

To this Holland answers that the State never gave any consideration for said railroad bonds; that the said pretended State bonds are null and void, because issued in violation of the constitution of the State of Florida; that the State has no legal or equitable lien on said property, and acquired no right or interest in the bonds alleged to have been issued by said company, and that said railroads have no lien or charge whatever on said railroad, or the property purchased by Holland.

The demurrer to Holland's answer, we hold, places the case in the position that it would be if the cause was set down for hearing on bill and answer. The rule then is, "where the case is heard upon bill and answer, every matter set up in the answer, whether responsive to the bill or of pure avoidance, must be taken as true; and this is the rule even where the defendant avers that he believes and hopes to be able to prove such facts." 1 Hoffman's Ch. Pr. p. 495.

The demurrer opens all the works of this plaintiff to attack. If then, they can recover in any particular, they must show that the State bonds were exchanged for railroad bonds, which have a lien superior to Holland's judgment, execution, sale and conveyance by the marshal.

1st. We hold that the Governor is not authorized to speak for and in the name of the State in this case; that there is no statute or warrant of law which authorizes him to bring this proceeding or set up this claim; that the Governor can not, by pleading or otherwise, bind the State and fasten on her people obligations for millions of dollars without statutory authority commanding him so to do. And that in this case the rule should be enforced by this court, when here is

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a case presented where the Governor, by private counsel, and against the views and opinions of the Attorney-General of the State, as shown by the journals and records, denies that the State has ever issued a single State bond, or is liable for any such obligation, or has any such rights as is claimed in her name by the Governor and his private counsel; and we hold that there is no law of Florida that warrants the use of the name of the State, or the employment of private counsel, and the passing by of the Attorney-General, as is done in this case by the present Governor and his solicitor, by which this attempt is made to fasten on the people of Florida millions of dollars of debt claimed to be obligations by the State, under the pretext that this suit is brought for the purpose of enforcing a lien of the State in bonds to which the State never claimed to have any interest. See Treasurer's Report, appendix laws of 1874-5, and Journals of the last Legislature of Florida, p. —

And so far from the State of Florida ever acknowledging the claim or obligation in this bill, set out and by virtue of whose superior equities this present Governor and his solicitor propose to take all this property; that the Legislature of Florida impeached the Governor who issued and delivered these bonds for so doing, "with full intent to violate the constitution of the State, and especially the said act of 1870." See Journal of Assembly, A. D. 1872, pp. 258, 259, Articles 3 and 4; Senate Journal, Extra Session, 1872, pp. 36, 37, 38.

So here we have the spectacle presented of the people of Florida, by their representatives, impeaching the Governor who issued these bonds, for so doing with intent to violate the constitution and the act of 1870, and the present Governor, Stearns, employing private counsel and using the name of the State of Florida to fasten on the people this enormous debt, under the pretext that they are protecting the State by assuming an obligation which the State never recognized. The State can have no claim on this property

unless the bonds issued by her were valid. The power to issue the bonds is claimed to exist in the words "and perfecting public works." Sec. 7, Art. XII.

The constitutional provisions are as follows:

ARTICLE XII. —TAXATION AND FINANCE.

"Sec. 6. The Legislature may also provide for levying a special capitation tax and tax on licenses; but the capitation tax shall not exceed one dollar per annum for all purposes, either for State, county, or municipal taxes."

"Sec. 7. The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt [of the State] and for the erection of State buildings, support of State institutions, and *perfecting* [must be State] *public works*."

"Sec. 8. No tax shall be levied upon persons for the benefit of any chartered company of this State, or for paying the interest on any bonds issued by said chartered companies, or by counties or by corporations, for the above mentioned purposes."

In every court where this question has come up the plaintiffs, by their private counsel, have argued that the Supreme Court of Florida has decided that these bonds were issued in accordance with constitutional authority. This we deny. All that the Judges decided was that the Legislature could issue bonds to complete the line of railway designated in the internal improvement act of 1855. But this road is not that line of railway, but an entirely new line, having its terminus at Mobile, Ala., while the line of 1865 commenced and terminated in Florida; and in addition to the line of the Jacksonville, Pensacola & Mobile Railroad Company, the new corporations were authorized to build and operate the line of 1855. See the charters where the powers of the Florida, Atlantic & Gulf Central Railroad Company was given to the Jacksonville, Pensacola & Mobile Railroad Company in the first section of the act of 1869, and the

powers, privileges, franchises, &c., of the Pensacola & Georgia Railroad Company was given to the Tallahassee Railroad Company. These powers were decided by this court, in 10 Florida, page 145, that both these companies had a common right to build the line of road of 1855, hence the Jacksonville, Pensacola & Mobile Railroad Company had the power to build and operate two lines of railway, the first being the road to Mobile, designated in the first section of the act of 1870.

2d. That part of the line of railway laid down in the act of 1855, which was unfinished. It was to this last line of road the Judges said the State might issue bonds to perfect or complete that line of railway. But they never said that State bonds could be issued to build a railroad to Mobile from Quincy, which, when built, was to be the property of a corporation in fee, and which could at any time be sold by the company in fee.

The Supreme Court of the United States, at its last term, the greatest Chancellor on that bench, Mr. Justice Miller, delivered the opinion in the case of the City of Toledo, Central Law Journal, page 156, said: "The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy a tax for that purpose."

Our Constitution in Sec. 3, Article XII, provides: "No tax shall be levied upon persons for the benefit of any chartered company of this State, or for paying the interest on any bonds issued by said chartered companies, or by counties or by corporations, for the above mentioned purposes."

If, then, State bonds can be issued to build a railroad, the road thus built by the obligation of the State, to be paid for by taxes levied on her people, must, we hold, when built and complete, be the property of the State and her people, and not the absolute property of any corporation who hold it in fee and may sell it at any time in fee. It is a monstrous doctrine that the Legislature can, *ad libitum*, issue bonds and tax the people to build a railroad to Mobile for the

Jacksonville, Pensacola & Mobile Railroad Company, which, though designed to be built by the taxes collected from the people at large, is to become the absolute property of that corporation. And yet the legal monstrosity has been affirmed by the Circuit and Supreme Courts of the United States, and is now here again sought to be established by your honors.

Again: Where in the constitution can authority be found that will authorize State bonds to be issued to be exchanged for railroad bonds? This *swapping* of State obligations for railroad paper at the will of the Legislature, *ad libitum*, is certainly a new idea, begotten by those who believe that the Legislature are the dispensers of all power, and that it only requires a sufficient number of legislative votes to do anything. But this court will guard the constitution from such pernicious construction.

This court—that instrument created to guard the rights of the people from legislators, corporations, and even judges—and to this court we confidently look to re-echo the great principles laid down in the Topeka case, to-wit: That there are rights in every free government beyond the control of the State, and that the theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers.” Such is the language of Mr. Justice Miller, and grander words never fell from a bench, nor did jurist ever deserve a people’s homage more than that great Judge, for turning the gage of authority back to the landmarks that our fathers have set, and telling them from the Supreme Court of the United States, thus far shall thou go and no farther.

We further hold, that the language of the act of 1870 clearly provides that the only statutory bonds that can be sued under this act, that are to have a statutory lien on the road, has reference solely and exclusively to the road west of

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Quincy, designable in the first section of act of 1870. It is not pretended that any mortgage was ever given to the State, yet the bonds to be given on the one hundred miles east of Quincy, provided for in the 4th section of the act, clearly apply only to State bonds to be given in exchange for railroad bonds, secured by a first mortgage, and not by the statutory lien provided on the road west of Quincy.

Again, we ask, if all this is wrong where is the authority to issue State bonds, not only to complete the road but "in order to aid the said Jacksonville, Pensacola & Mobile Railroad Company to complete, equip, and maintain its road" See Sec. 2, Act 1870.

So that the Legislature may issue bonds to complete, to equip it, and after it is completed and equipped then issue more bonds to maintain it, or in other words to operate it.

So that all the railroad company required was votes enough of a Legislature, and then the bonds of the State might be issued to build and equip a road for them to own in fee; and after it was built and equipped they could get more bonds to operate, maintain or run it. A very nice arrangement, that, for the corporation. But how about the rights of the people who are to be taxed to pay the obligations thus issued "in order to aid" that Jacksonville, Pensacola & Mobile Railroad Company? If ever a constitution was treated as a nullity it was when such doctrine as this was attempted to be fastened on a people by an Executive charged with guarding that constitution.

Again, this act of 1870, and the original acts, clearly show that no exchange of bonds was to issue except for each mile to which the railroad company had a clear and perfect title. Yet the Legislature in the charter of the Tallahassee Railroad Company, in the 6th section, provided for a lien of superior dignity to all others for the instruments, whether bond, mortgage or otherwise, given on these roads by Dibble and associates, for more than a year prior to the act of 1870. No mortgage could then be given by the

Jacksonville, Pensacola & Mobile Railroad Company, or this road acquired by consolidation, of equal dignity to this, by the act of 1869 created. Nor could the Legislature of 1870 disturb that lien without violating the constitution of the United States. Hence, no first mortgage could be given to the State on the road east of Quincy, formerly owned by the Tallahassee Railroad Company.

Now, we ask, is this court to sever the bonds, if any issued in accordance with the requirements of the constitution, from those issued in violation of that instrument? The Almighty waits for the day of the arraignment of all, and the termination of all sublunary things, before even He will undertake to separate "the sheep from the goats."

But it is said that Holland cannot raise this question. Why? Because our sovereign lord, the King, that is to say the present Governor and his private counsel, have seen fit to claim and allege that they, in the name of the State and for the State, are seeking to establish what they call a lien on this property that Holland bought, of superior dignity to all others. Holland bought all the right, title, and interest of the defendant company in this property, and no particle of property can be taken from him unless by one having in court shown a superior title thereto. The constitution of the United States, though lately, and frequently amended, and by one of those amendments emancipated the blacks, has not yet been so changed as to enslave the whites. One of the rights of a free man in this land is to hold, enjoy, and possess property without let or hindrance, even by the Governor of Florida, until dispossessed by judgment of a court rendered in favor of one having superior title, not of one *ascertaining* such superiority.

The State of Florida professed in the act of 1870 to aid this company. That company consisted, 1st, of the incorporators and their associates; 2d, of their successors, if any; and lastly, of their assigns.

How, then, is *this aid* to be given? By taking the prop-

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erty for the satisfaction of bonds issued in violation of constitution. In other words, to get the property for nothing.

The Supreme Court of the United States, in *Aspinwall vs. Davies Co.*, 22 Howard, 364, says: "That the subscription was made and the bonds issued in violation of the constitution of Indiana, and therefore without authority, and void." Yet, nevertheless, here is the property of the citizens attempted to be taken from them on a claim set up on bonds that issued in violation of the constitution, and are void. 10 Wall., 683.

Judge Bradley, in the great opinion rendered by him in *Montgomery, Ala.*, said: "Public officers cannot acquire authority by saying they have it." They cannot thus shut the mouth of the public whom they represent, yet here this public functionary seeks to shut Holland's mouth by keeping him from denying the constitutionality of those bonds, because forsooth his Excellency wants this railroad, for what? not for the State, because the State, whenever it has spoken by voice other than his, has denied the validity of these bonds.

Again, the record shows that when the plaintiffs took all the property and assets of the company in March, 1872, by their own averments, the interest on the State bonds was paid and provided for until the following July, 1873, and the net income of the corporation was over \$100,000 a year, and the State that proposed to aid the corporation, by seizing the property, as this court has decided, illegally, brought the company to ruin and forced the indulgent creditor, Holland, and, in self-defence, to levy and sale. The equity of the State is like that of pirates, who having run a fine ship ashore, go into admiralty, and pray a sale of ship and cargo for salvage.

The answer alleges that the railroad company paid the State coupons due before the commencement of this suit, and we hold that in equity pays the railroad coupons, and hence the State cannot collect interest on the railroad bonds.

when the interest on the State bonds was paid by the defendant company.

The law required the Governor to designate a place in the city of New York where the bonds of the State and interest were to be paid by the company. See Sec. 10, Act 1869, and Sec. 2, Act 1870, p. 11. The answer avers no such place was ever designated, and that there can be no default.

These railroad bonds are not single bills nor commercial papers; they are not payable *alone in money*, but may be paid to the State in any State paper or indebtedness, even before maturity; they are payable to the State alone, and are not assignable.

The Act of 1869, Sec. 13, is as follows:

"Sec. 13. The said Jacksonville, Pensacola & Mobile Railroad Company may, at any time before maturity of its bonds, discharge its debt to the State, or any part thereof, by payment in national currency or in bonds of the State; *Provided*, That this shall not be construed to include indebtedness incurred in aid of the rebellion."

This is the statutory contract, and no court or legislature can change it; and, like all contracts, we have a right to require its enforcement, and to it we must look, and not to the law merchant as to negotiable paper, bills of exchange, or promissory notes.

But we have shown that the State bonds, so called, are utterly worthless, and that the State gave no consideration for the railroad bonds, hence the claim of the State cannot be enforced. 1 Story on Contracts, Sec. 427, pp. 526-7. The law requires not only a consideration but that it should be valuable. *Ib.*, Sec. 429.

Whoever takes a bond must see that there was authority to issue it—even an innocent holder for value is thus bound. 6 Wall., 683.

Again, we hold that the construction to be given to these statutes, or to the contracts thereunder, do not depend on

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that which the parties themselves have put upon it. 10 Wall., 367.

Again, the certificate under oath by the President was a prerequisite to any State bond being delivered. The answer denies that any such oath or certificate was ever made, hence no bond could issue. Sec. 2, Act 1870.

Holland's answer in the Supreme Court of the United States was made a part of this supplemental complaint by the plaintiffs, and therefore we hold its averments and the averments of the plaintiffs, and show that no judgment should be rendered for them for that; they have thus stated themselves out of court; they have made his answer a part of their own complaint.

The answer denies that the railroad company ever was indebted to the State of Florida, and denies all fraud, &c.

We hold, that as Holland is responsible for all equities superior to his judgment lien, that he has the right to question and require proof in a competent court, of any demand or claim, by any one who avers a superior legal or equitable right to him before this property can be taken from him, or sold by any one, State or otherwise.

The record shows that Holland, after his purchase, and before any suit was brought against him in any court, offered to sell and convey this whole property to the plaintiffs upon being paid his judgment; therefore, we hold, that the court below erred in sustaining the demurrer to Holland's answer, and that we have shown that the plaintiffs, in their complaints, have not stated facts sufficient to constitute a cause of action.

H. Bisbee, Jr., for appellees.

The State and Trustees of the Internal Improvement Fund commenced a suit for relief March 20, 1872, against the Jacksonville, Pensacola & Mobile Railroad Company *et al.*, and a receiver was appointed over the entire railroad west of Jacksonville.

June 22, 1872, an amended complaint was filed by the plaintiffs, wherein the plaintiffs, the trustees, set up a demand against the said company and its property for \$472,000 due, as a part of the purchase money arising from the sale of the railroad west of Lake City, March 20, 1869.

The State, in said amended complaint, avers that it is the holder of three thousand bonds issued by the said company; that said bonds are a lien upon all of said railroad west of Lake City; that a large sum of interest was then due, and that the Governor's right, under the statute of January 28, 1870, to seize and sell the road, had accrued.

On April 2, 1874, the court below rendered a decree in favor of the trustees for the balance of the purchase money aforesaid, against said company, from which said company has not appealed. Defendant Holland appealed, and said decree was reversed as to him, on the ground that he had never had his day in court to make his defense, if he had any, against such demand.

But this decree, or the rights of the trustees against Holland, are not now before the court on this appeal, the foregoing proceedings being stated as brief history of the case.

On March 24, 1874, the plaintiffs filed a supplemental complaint, alleging that the possession of the receiver had been disturbed, and, *inter alia*, that the defendant Holland, at the December Term of the United States Court, 1872, obtained a judgment against the said company for the sum of about \$60,000; that execution at law issued thereon; that the marshal levied such execution upon the equities of redemption of said company on all its property located west of Lake City; and upon such levy, said property so levied was sold on the first Monday in May, A. D. 1874, and defendant Holland became the purchaser, his bid being admitted upon the execution. And that on or about the 7th of July, Holland, under such purchase, acquired the possession of said railroad property, and received the rents and profits thereof.

The supplemental complaint further alleges that a large sum of money is due the State on amount of interest due, and that the defendant Holland is insolvent, and prays for a decree for the balance of said purchase money, and for the interest due the State; also a prayer for general relief, and that defendant Holland may be perpetually enjoined from interfering with the property or asserting any right hostile to the rights of the State or the holders of said bonds.

On the — day of May, 1875, Holland filed his answer to the supplemental complaint, admitting that he purchased the railroad, as alleged in said complaint, under an execution sale, and does not deny the allegations by the plaintiff that he is insolvent, and, therefore, by force of Section 118 of the Code, he admits such allegations of insolvency to be true.

Defendant Holland sets up in his answer that the State bonds delivered by the State to the Jacksonville, Pensacola & Mobile Railroad Company, as the consideration of the bonds of that company, held by the State, are unconstitutional, and, therefore, that the State has no lien upon the property.

Holland further avers and claims in his answer that as the purchaser, under said execution in his favor, he becomes and is the absolute owner of said railroad, and that his title is paramount to any interest the State has in the property.

Holland has in his answer a vague allegation that no interest was due on the bonds of the Company held by the State, but does not aver that no interest was due when the amended complaint of June 22, 1872, was filed, nor when the supplemental complaint of March 24, 1874, was filed.

Holland further avers that the State court receives interest due on said railroad bonds, because the State never designated the place in New York where the coupons should be payable.

The material parts of Holland's answer is included in what has been above stated, and to this answer the State (not the trustees) filed a general demurrer.

The court below sustained the demurrer, and from the order sustaining the demurrer the defendant prosecutes this appeal.

Argument.

The question in the case is, what are the relative rights of the parties, the State, and defendant Holland?

The defendant's answer admits that the State is the holder of three millions bonds of said company, but denies they are a lien on its property, while the plaintiff insists that said bonds are a lien, and that whatever the defendant took by the sale under the *fi. fa.* is burthened with this lien.

1. The State further insists that neither the railroad property nor the franchises could be sold on a *fi. fa.*, and that Holland has no right to receive the income of the road nor to control the possession of it.

2. That if by his purchase Holland acquired the fee, or any interest in the real estate appurtenant to the road and necessary to the use and value of the franchise, he cannot possess himself of such real estate, nor disconnect it from the franchise to be a corporation, and receive tolls either by a conveyance or otherwise, and that he took the same, whatever in law or equity it may be, subject to the State lien.

3. The State contends that the levy, as shown by the return on the writ of execution, was void, because the officers proceeded to levy upon what could not be, as well as what *possibly* could be sold on a *fi. fa.*, and thus intermingling the two, rendered it a nullity, and may be so decided, when it is brought collaterally before the State court.

The complaint of June 22, 1872, avers that said company is insolvent, and specifies certain judgments recovered against it, and alleges that the road west of Quincy had then been sold under an execution. The answer of the Jacksonville, Pensacola & Mobile Railroad Company does not deny the allegation of insolvency and the recovery of said judgments. The judgment in favor of Holland and sale to him, would seem to preclude any doubt as to its insolvency. This



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being so, if it be held that the State has a lien to secure said company bonds, they being more in amount than the value of the property, no matter what title he took.

State Lien.

Defendant contends that the State has no lien, upon two grounds:

1. That State bonds delivered for railroad bonds are unconstitutional and void, and, therefore, were not a good consideration for the railroad bonds.

2. That if the State bonds are constitutional, the acts of June 24, 1869, and January 28, 1870, did not authorize an exchange of bonds on the road east of Quincy.

Constitutionality of State Bonds.

Appellee submits and insists that this question is not in this case, *and cannot be raised by the appellant.*

It is too clear for argument that the Jacksonville, Pensacola & Mobile Railroad Company having received the State bonds and sold them, as it admits in its answer, and the deed of trust to Chase *et al.*, an exhibit to the supplemental complaint cannot be heard to say that the State bonds are unconstitutional, as a defense to suit, to force the payment of its bonds.

Having received and sold the State bonds, the company is estopped from setting up a defense and from raising the question of the validity of the State bonds.

This is a general principle.

The State bonds are the consideration paid by the State for the railroad bonds, and the latter being covenants under seal, the consideration cannot be inquired into by the obligor. The company does not attempt this, but admits that the State has a lien, both in its answer *and deed of trust, made long before Holland acquired his interest*, which deed was made an exhibit to the complaint filed June 22, 1872, when Holland represented the company as its attorney in this case. and of course Holland had full notice of the issuing of the

ls, and that the State had a lien upon the road to secure payments.

Holland, as the purchaser at the execution sale, stands in shoes of the company, (assuming that there are no objections to the sale,) and is estopped from setting any debt which the company is estopped from *setting up*. What estops a "judgment debtor, estops a purchaser at a judicial sale under such judgment." Her. on Est., Secs. 216, 35 Penn., 525; Richards vs. Johnson, 4 Hurls & N., and other cases there cited.

Any person claiming under one who is bound by an estoppel, is himself bound by the same estoppel;" Id., Sec. 3; Phelps vs. Blount, 2 Dev., 177; Douglas vs. Scott, 5 Dev., 199; Work vs. Willard, 13 N. H., 389; Maple vs. Russell, 53 Penn., 351.

No man shall be allowed to dispute his own deed, for it is not only conclusive upon the party executing it as to the point intended to be effective by the instrument, but also as to the facts recited in it." Hermann on Estoppel, 211, last part on page 232; Id., Sec. 212.

Now, the bonds of the company (a copy of one of which is in the court below and should be in the record) recite that they are executed in accordance with the provisions of the acts of the Legislature authorizing this issue. These acts of the Legislature making them a first lien, constitute a part of the contracts, consequently, neither the company nor Holland, who claims under the company, can deny the lien.

Holland is a privy in estate of the company, besides:

A purchaser at a judicial sale can only take the interest the debtor had, subject to all outstanding equities." Osterman vs. Baldwin, 6 Wallace, 116.

Again, "A purchaser of an equity of redemption cannot deny the validity of the mortgage on the same estate, and cannot hold the entire estate." Russell vs. Dudley, 3 Met., p. 1841.)

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"The purchaser of an equity of redemption can aver no title against any other person than the execution debtor, his tenants, and assigns. *Foster vs. Mellon*, 10 Mass., 421.

"The assignee of an equity of redemption cannot allege usury in the loan to the mortgagor to defeat a foreclosure by the mortgagee." *DeWolfe vs. J. Johnson, et al.*, 10 Wheaton, 367; *Adams vs. Barnes*, 17 Mass., 365.

The case cited (*supra*) in 10 Wheaton, would seem to be decisive of this question.

To have shown usury, would have rendered the mortgage void, as made in violation of law. The assignee of the equity of redemption was estopped from averring it.

Holland is in no better position than he would be had the company assigned all its interest to him, and if in one case he cannot show the State's mortgage void, he cannot in the other.

The ground of this doctrine is that it would be a fraud to levy upon an equity of redemption, thus acknowledging the mortgage and deterring purchasers and bidders at the sale, buying the property for a song, and then claim the entire estate.

It is true, Holland claims that the levy was upon all the property, right, title and interest of the company, something more than the equity of redemption; but this cannot avail him, *having admitted the existence of a mortgage by his levy*. The words, "property, right, title and interest of the company," would be taken by the public, as it was by the courts, as merely descriptive of the thing purchased; that is, the right, title and interest subject to the lien of the mortgage; otherwise it would be a clearly fraudulent act; and everything done for the purpose of keeping away bidders or preventing the property bringing its full value, is a fraud, and vitiates the sale.

But this is not all: If such an equity of redemption could be sold at all it could only be sold after an appraisal.

ment of the value of the equity of redemption as required by the statute. Thompson's Digest, p. 355.

This was not done. See Marshal's return and answer.

"Execution *cannot be levied* upon an equity of redemption except in the manner provided by the statute." Warren vs. Childs, 11 Mass. 222; 12 Cush. 344.

"Compliance with the statute should be shown by a return of the Marshal on the writ," *but it is not.* Welsh vs. Joy, 13 Pick., 474.

At common law an equity of redemption could not be sold on a *fi. fa.* Smith vs. McCann, 24 How., 398.

It follows that the statute authorizing the sale of an equity of redemption must be strictly complied with, otherwise no title passes; and this is the same both in the State and Federal Courts.

"A sale by the marshal not conforming to the State Practice is *irregular and void, and conveys no title.*" Smith vs. Cockrill, 6 Wall., 756; Moncure vs. Zuntz, 11 Wall., 416. These cases are directly in point.

But we go farther, and insist that this statute authorizing an equity to be sold does not apply to corporations because the State has legislated and specially provided *what writs* may be issued against a corporation, and upon what property such writs may be levied on, that is *goods and chattels and current money of the corporation.* Here is a limitation as to the kind of property subject to levy on a *fl. fa.* vs. a corporation. *When this class of property cannot be found* sufficient to satisfy the execution, then the remedy of the creditor is by sequestration of the corporation property, through a receiver, to apply the income of the corporation till the debt is paid, as provided by the Act of February 17th, 1872. Chapter, 1870. See Rorer on Judicial Sale, chapter 14.

Where this subject is fully discussed, and authorities cited to show that sequestration is the *proper remedy, and that a franchise cannot be sold on execution at law.* This is wan-

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dering a little from the point, which is, that Holland cannot raise the question of *the validity of the State mortgage* by averring illegality of the State bonds, or otherwise. The State bonds are not in question in this suit. No party to this suit is seeking to enforce payment of the State bonds. To agitate the question can serve no good purpose. The State, by delivery of the bonds, is indemnified sufficiently to sustain the promise and covenant of the company, contained in its bonds, even if the considerations could be inquired into. An appellate court never decides any question of law, not necessary to be decided, in disposing of the case before it.

Lien of Company Bonds.

Assuming, then, that the constitutionality of the State bonds cannot be raised nor decided in this case, to what extent has the State a lien to secure payment of the Railroad bonds? Defendant pretends that the statutory lien does not extend to any of the road east of Quincy; that the lien *does* extend to the road east of Quincy, is easily demonstrated.

Section 2, Act of January 28th, 1870, Laws of Florida, chapter 1731, authorized the Governor to exchange bonds with the company for the whole line of road owned by, or belonging to, said Jacksonville, Pensacola & Mobile Railroad Company.

The pleadings admit that that company owned the road west of Lake City, and *acquired* it between that point and Quincy and the St. Marks branch, by consolidation of the Tallahassee Railroad Company.

The 3d section of said act provides "that *the State* shall have a lien which shall be valid to all intents and purposes as a first mortgage, duly registered upon the part of the road for which the State bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of *the line which it may now have*, or may hereafter acquire, together with *all the rights, franchises, &c.*

thereto belonging." This language is clear and explicit, and includes all present and thereafter acquired property.

Where the language of the mortgage was, "all present and future to be acquired property," it was held by the Supreme Court of the United States that the lien attached to all property subsequently acquired, to the exclusion of second mortgages and judgment creditors. *Pennock vs. Coe, Trustee, &c.*, 23 How., 117.

The same principle rigorously applied in the following cases:

Dunham vs. the Cincinnati Railroad Company, 1 Wall., 254; *Galveston Railroad vs. Cowdray*, 11 Wall., 459; *Sidney Dillon vs. Barnard*, Supreme Court United States, decided last term, not yet reported. 2d vol. Red. on Railways, 4th ed., pp. 468-90; 2d Seldon, R. 179; 3d Green, Ch. R. 377; 32 N. H. R. 484; 2d Story R. 630; 25 Barb. 286.

In the light of the principle established by these authorities the lien attaches to property acquired by the company after the exchange of bonds, and even had the company not owned the road east of Quincy when the bonds were exchanged, this lien attaches to it in full force the moment it was acquired to the exclusion of judgment of creditors.

Indeed, if not a statutory lien the bonds would be treated as a mortgage by a court of equity, and enforced accordingly, where bonds were issued by a canal company, declaring on their face, in effect, that they were a mortgage bond, *though not in words*. Where there was no lien by the statute nor by a mortgage, the Supreme Court of the United States held, "that such bonds will be treated by a court of equity as a mortgage, and enforced according to the intention of the contracting parties." *The Water Valley Canal Company vs. Vallette et. al.*, 21 How. 414.

On such a lien the appointment of a receiver was sustained. *Id.*

The same principle was enforced in the following cases:

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King vs. Tuscumbia C. & D. Railroad Company, 7 Penn. L. J. 166; 12 Price, 197; 8 Price, 697; 25 Barb. 286.

In the case of the Water Valley Canal Company, 21 How. 414, it was contended that the bonds not being secured by any mortgage, placed the holder in no better position than a creditor holding an unsecured demand. The court held the contray, and sustained the lien of the bonds.

Now, the bonds held by the State recite that they are issued in accordance with the acts of the Legislature. Those acts provide for and specify first mortgage bonds; hence the company contracted for and intended to give first mortgage bonds. The acts of the Legislature relating to the character of the bonds are as much a part thereof as if the language of the acts were duly set forth therein; therefore, supplying the principle of the authorities last cited, they must be treated as a mortgage bond, and so enforced. Besides, the doctrine of estoppel will not permit Holland to question the lien.

The conclusion is, that the State is entitled to the same remedies ordinarily granted to a person holding a first mortgage railroad bond, and to a decree for interest unpaid, and a decree for sale if asked for; and that Holland must be enjoined at least from asserting any rights hostile to the rights and remedies of the State, or the holder of the railroad bonds, and be adjudged to hold what he has, if anything, in subordination to the rights of the State.

And in this view of the State's case, Holland's answer constitutes no defense to the action. The question as to the amount of interest due is a matter to be determined before the referee or master.

But we go further, and contend that defendant should be enjoined from receiving tolls and interfering with the possession of the road in any manner, because the franchise cannot be sold on execution at law. A corporate franchise cannot be sold on an execution at law, unless the Legisla-

ture of the State has specially so provided by statute to be sold. 24 Howard, 257; 21 Howard, 125.

Nor can the real estate attached to the franchise and necessary for its use and to its value. 24 How. 257; Rorer on Judicial sale, ch. 14; 2 Redfield on Railways, Sec. 235, ch. 33, pp. 465-6; Note W. pp. 544-5; 5 Iredell, N. C., 297, 305; 4 Hump. 488; 13 Sergt. & Rawle, 210; 9 Nott & Sergt. 27.

When real estate can be levied upon: If real estate be joined in one levy with the road, the whole levy is void. 2 Red. p. 545; Note 2, 13 Sergt. & R. 210.

Reason of this rule is, that a franchise is conferred by the sovereign power upon certain persons because of special confidences reposed in their integrity and ability to accomplish the object in view, and thus benefit the public; and public policy forbids a sale on execution of such franchise and the property with which it is connected, and thus to separate the structure into divers parts, in the hands of individuals. It is a trust delegated by the State to a political person, and cannot be delegated to any other person without specific legislative authority. 2 Red. Sec. 335, pp. 465-6. Note.

Defendant concedes this to be a well settled general rule, but avers that the franchise in question is taken out of the rule by force of the word "assigns" in the first section of the act of June 24, 1869. He contends that by reason of the word assigns, the company could convey by deed its franchise, and that whatever it could convey by deed can be sold on execution at law. As a general principle this may be so, but there are exceptions, and this is one. At common law, an equity of redemption could not be sold on execution, but certainly the owner of it could sell it by contract, by deed of release, &c.

But the language of said section is not that the company may assign its franchise, but the Swepson and others, their "assigns," are hereby constituted a body politic and corpo-

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rate, &c., and there is nothing to warrant the conclusion that the Legislature intended to authorize the company to sell its franchises.

It is incredible that such an intent could have existed. It is against the entire policy of the State, as shown by its previous history and legislation.

Whenever the Trustees have sold a railroad under the act of 1855, even under a mortgage of the franchise, the purchasers have always applied to the Legislature for an enabling act. This has been the course, in like cases, in other States.

Section 3d., act of January 28, 1870, reserves in the Legislature the power of approving any sale made by the Governor to foreclose the State's lien. The court will not recognize anything less than express and clear language of an act of the Legislature to that effect, as authorizing the sale of a franchise on a *fi. fa.* 21 How. 125; 24 How. 257.

Besides, the power given by the Legislature to assign corporate property, does not pass the franchise by such an assignment. 2 Red. 553, Sec. 4; 21 Barb. 221; 3 Comst. 338.

There is no act of the Legislature of this State authorizing the sale of a corporate franchise on an execution at law, and it is impossible that the road-bed, depots, workshops, can be sold and severed from the structure, and thus destroy the work and the value of the franchise.

Defendant contends that the franchise is a chattel, within the meaning of the language of the act of 1834. (Thomp. Dig. 354.) authorizing goods and chattels to be sold on execution. But, being used in the statute in connection with the word goods, it is plain that the word chattels was used in its ordinary sense in such connection.

Holland sets up in his answer, that the State bonds are illegal, because, as he alleges, the President of the company did not certify under oath, as required by law, as to the length of the road. The language of this averment is such as to leave it in doubt whether defendant intended to aver

that no certificate was made at all, or that it was made, but not as it should have been made.

But here, again, the doctrine of estoppel precludes the company, and therefore the defendant, from raising the question; and, "where a corporation is authorized by law to issue bonds, having issued bonds reciting facts showing regularity upon their face in a suit thereon, the corporation is estopped from denying that they were issued conformably to the statute." 2 Black. 722; 1 Wallace, 83, 291, 384; 5 Wallace, 772.

"The only defense open by a corporation in a suit by a holder of its bonds, is the *want of power* to issue the bonds. If power to issue existed, non-compliance with the statute authorizing the issue, will not defeat an action by an innocent holder for the value." 21 How. 539; 14 Wall. 282; 13 Wall. 297, (1871).

In the case last cited, it was held that even where a certain portion of the citizens were required to vote for the issue of bonds, a *bona fide* holder for value will recover, though no vote was taken.

The law requiring the certificate was the mode furnishing the Governor the number of miles of road completed and in running order before the exchange was made. It does not go to the power to issue. The bond is merely directory—is not of the essence of the thing to be done, and any other mode would have answered the purpose.

Gabriskie vs. C. & C. Railroad Company, 23 How. 381, is a strong case to illustrate the doctrine that a corporation cannot defeat an action upon its bonds by averring non-compliance with the statute in their issue.

The fifth subdivision of the answer avers, that the Governor never designated the place in New York as provided by the statute where the interest on company bonds should be paid, and the company cannot be in default until such place is designated.

If Holland has succeeded to the place of the company,

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and standing in its shoes, and liable to pay the interest on the company bonds, he can raise this question; but if it be held that by his purchase he did not acquire that position, and is not entitled to the possession of the property, he cannot raise the question. But this averment made by Holland, or the company, even if true, is not a defense to the action for a decree adjudging the lien of the State to be valid, and declaring the rights of the parties.

Nor is it any defense to a decree for interest which has actually accrued. This provision of the statute was simply to provide a place where it would be convenient to make payment; it does not constitute a part of the obligation of the bond or coupons; it is not a necessary part of the obligation, and these coupons are within the rule of law laid down as follows: "The time and place of payment in a promissory note or bill of exchange are not of the essence of the contract, and no averment (at law) of presentment at the time and place is necessary in an action against the maker or acceptor. If the defendants claim that they were ready at the time and place designated to pay the obligation, they must allege and prove it; and it will avail them only to the extent of preventing the accruing of interest, but does not discharge nor bar the action. Edwards on Bills and Notes, 479, 481; 17 Johns. 248; 1 Peters, 604; 11 Wheaton, 171; 3 Richardson, 311; 8 Cowen, 271.

But this is not alleged in the answer, and consequently nothing is alleged to prevent the accruing of interest upon the coupons after they become due.

In subdivision 6 of the answer, there is a vague and argumentative averment that the interest was paid up to the time when suit was commenced. Suit was commenced against the company March 20, 1872, wherein no demand for interest was specially set up, but the amended complaint of June 22, 1872, does not set up such demand and state the amount of interest due then. The supplemental com-

Plaint of March 24, 1874, which is the commencement vs. Holland, avers that no interest has been paid since the suit was commenced, and states the amount due in an exhibit.

This averment, then, in the answer, is taken as an averment of the fact that interest was paid up to, and until after the suit was commenced, would be no defense to the amended or supplemental complaint. The amount of interest is a matter to be settled on a reference—a dispute as to the amount is not a defense, if any is due. Besides, in all actions of this nature, the decree must be for all sums due when the decree is rendered, not merely what was due at the commencement of the suit. (4th Ed.) 2 Hilliard on Mortgages, pp. 211, 218-9, note a; 14 Wis. 350; 11 Paige, 330; 11 Mch. 384; 11 Penn. 282; 45 N. H. St. 141; 7 Ohio, 231; 20 Ga. 342; 41 Miss. 284.

Interest due under a mortgage and in arrear, an action will lie though no part of the principal be due. 16 Ind. 45; 2 Vol. Hill. on Mortgage, 4th Ed., pp. 216, 219, note; 18 Cal. 460; 2 Bl. 500.

Power to sell under mortgage does not oust equity jurisdiction and a judgment for interest proper on such a mortgage. It is treated as a power of attorney. 1 Hilliard on Mort. p. 131; 26 Iowa, 253; 1 Jones, 290; 6 R. J. 542; 2 Cliff. C. C. 454; 54 Penn. 127.

There is a power of sale given under the statute, to the Governor, upon default, for twelve months. It is not improper to have it judicially determined whether default has occurred for twelve months, and a judgment for interest for that period will be conclusive and relieve the Executive from the responsibility of deciding that question. When the amount of indebtedness is in dispute this course is desirable. The case in 54 Penn. *supra*, was a suit at law upon the bonds, and the same rule applies in a suit upon the coupons.

Prayer of Complaint.

What relief may be granted? Upon answer, prayer is of no use and unnoticed. Voorhies' Code, p. 424.

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Under the Code practice, the defendant having answered, the plaintiff is entitled to any relief consistent with the case made by the complaint. Code, Sec. 221; 40 N. Y. 510; 37 N. Y. 494; 39 N. Y. 287; 10 N. Y. 51.

The last two cases above cited illustrate the rule in both cases; different relief was granted than that contemplated by the pleadings. Vide Voorhies' Code, pp. 425-6.

A careful examination of the supplemental complaint, and Holland's answer, will show that there is no issue of fact or facts that are a defense to the action furnishing any bar to the action by the State.

Subdivision 7th of answer, makes an issue of fact with the co-plaintiff Trustees, but the latter do not demur.

Subdivision 9th alleges that the bonds were illegally issued, and therefore illegally exchanged, and consequently the company was not indebted to the State at the commencement of the suit.

The fact here averred is predicated upon a conclusion of law.

A demurrer only admits facts that are relevant and well pleaded, not conclusions from the facts. 9 Barb. 297; 11 How., N. Y. 26; 10 Abb. 370; Voorhies' Code, 205.

The rule, that on demurrer judgment will be given against him committing the first error, is abrogated by Sec. 14 of act passed July 8, 1861. 11 Fla. 80.

The objection was raised, in the court below, that the State cannot collect interest from the company, because it has not paid interest on its bonds. This is hardly worth noticing. It goes to the consideration paid by the State, which I have shown cannot be inquired into by the defendant.

Besides, a *promise for a promise* is a consideration; and the theory of the law under which the bonds were exchanged is, that the company should first pay the State, and thus furnish money to pay the interest on its bonds and prevent a resort to taxation.

Objection was taken in argument in Court below, that the State and Trustees could not join as plaintiff. *Technically an objection of multifariousness.*

Under the Code, this objection can only be taken by demurrer. Code, Sec. 95.

This objection in equity must be taken before answer. 5 How. 127.

But Holland does not make the objection in his answer, and, all objections not taken by demurrer, or answer, are deemed waived. Code, Sec. 99.

The State and Trustees are substantially but one person. The causes of action arise differently, it is true, but both are interested in the subject matters, and must therefore be made parties. It would be extremely awkward for the State to make the Trustees defendants, and the Trustees could not make the State a defendant. They could not be placed upon the record in any other way than they are, and being upon the record the court will give such relief as each is entitled to.

"All persons having an interest in the subject of the actions, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." Code, Sec. 68, Sec. 70.

"Several causes of action may be united in one action, when they all arise out of transactions connected with the same subject of actions." Code, Sec. 117.

"Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not effect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Code, Sec. 126.

It was intended in the court below, that Holland's answer in the suit in the Supreme Court of the United States is made a part of the supplemental complaint in this cause, but it will be seen by reference to the supplemental complaint that said answer is merely referred to as an exhibit to

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prove that Holland admitted the appointment of a receiver in this cause.

Jurisdiction of the court below has not been raised by the defendant. Should it be, I respectfully refer to my brief on this point, on the first appeal in this cause, heard by their Honors Justices Westcott and Fraser.

It will be borne in mind, that the company in its answer, admit the lien of its bonds upon the road, and in the deed of trust to Chase *et al.*, made an exhibit to the amended and supplemental complaint. The company admits the receipt of all the State bonds, admits the lien of the bonds upon its property, and provides therein for the payment of interest.

Holland, claiming under the company, is bound by these admissions upon the doctrine of estoppel.

These admissions in the answer of the company, are evidence against Holland. Admissions of a co-defendant is evidence for the plaintiff against a defendant claiming under the defendant making the admission. 2 Daniels Chy. 839; 1 Greenleaf Ev., Sec. 178.

Purchaser Pendente Lite.

Holland acquired his interest, such as it is, if any, pending the suit against the company, and a party so purchasing is bound by the decree even though he is not made a party defendant. 1 Story's Eq. Juris., Secs. 405, 406.

It is admitted on the record that the company is insolvent. The fact that it suffered Holland to levy upon and sell its property, is evidence of that, and it must be apparent that his object is to retain possession of the road, and put the earnings in his pocket to the injury of the State.

It is apparent that the property is insufficient in value to satisfy the lien of the State.

In Pennock vs. Coe, Trustee, 23 How. 117, the holder of a second mortgage bond recovered judgment upon the bond, and levied upon the property, and advertised for sale. The

suit was brought by the Trustees for holders of the first mortgage bonds to enjoin the sale, and a perpetual injunction was granted; and, it appearing in that case that the property was not sufficient to pay the first mortgage bonds held, that the judgment creditors had no interest in the property.

The same principle should apply in this case. It is clear that the State had an equity to enjoin the sale by Holland, and it is equally clear that it has an equity to have Holland enjoined from taking any benefit or fruit by the sale. If injunction was proper before the sale it is proper now.

Admitting, for argument, that Holland purchased all the interest the judgment debtor had, still he is in the situation of a party purchasing property, with a mortgage upon it, for double what it is worth.

The appellee submits that the judgment of the court below should be affirmed; and the defendant, not asking to amend, the State can apply to the court below for a final decree declaring and adjudging the rights of the parties. The amount of interest can be ascertained and embraced in the decree, and a long step taken towards the end of this railroad warfare.

The State is contending to have the question of the validity of its lien put at rest. This settled, all the litigations are easily ended, and the holders of the bonds of the State stand ready to surrender them to the State, and take a bond upon the railroad, thus relieving the State of the disadvantage of injury upon her credit arising from the outstanding of \$400,000 of her bonds. This is a worthy and honest object, creditable to any citizen, lawyer or Judge. All obstacles in the way of accomplishing this end interposed by individuals for private gains should be swept away. All alleged interest set up by any person since the lien of the company bonds in the hands of the State attached to the property should be held subordinate to the rights of the State, and

by the decree of the court be made to yield to those paramount and superior rights.

Upon well-settled principles, it is clear, if Holland had not been made a party to this suit, being a *purchaser pendente lite*, he would be bound and concluded by any decree rendered in the case; and, he having been brought in to afford him an opportunity to be heard upon his rights and merits, if he has any, any objection made by him of improper joinder of plaintiffs of causes of action, or any objection not going to the merits or substantial rights, comes with no force from him, especially if he does not take them by his answer.

As to the demands of the State, all the defendants have pleaded to the merits. The validity of the bonds; their lien upon the property; the amount of interest due; the legal and equitable rights of all the parties are presented upon the record. The court has jurisdiction of all the parties. Its judgment will be binding upon them, so far as the Trustees are concerned. A decree has been rendered for them against the company. The case is at an end. Had Holland not been made a party, he would have been concluded by said decree, whether or not he is now; and what his rights are, can as well be determined upon this record as any other.

Courts of equity abhor multiplicity of suits, and delight in one suit to adjudicate upon the rights of all persons claiming interests in the property, and give repose to litigation, in the present State of the record, with the parties at issue upon the merits, after protracted litigation. The objection of Holland that two causes have been joined, that the suit by the State should be dismissed and commenced anew, is repugnant to equity—contrary to the provisions and spirit of the Code—and shocks the mind of a court of equity. To such an objection a court of equity will turn a face of flint.

The solicitor for appellee, by way of apology for the

length of this brief, desires to state that it has been written in anticipation of not being present at the hearing.

If any questions shall be raised by the appellant not herein discussed, and the court shall desire any argument from the appellee, it will be furnished upon notice.

WESTCOTT, J., delivered the opinion of the court.*

The judgment of the court below, from which this appeal is taken, was a judgment sustaining the demurrer of the State to the answer of defendant, Daniel P. Holland. Defendant, Daniel P. Holland, claims to be the owner of the road and of the franchises granted to the corporation known as the Jacksonville, Pensacola and Mobile Railroad Company, by virtue, as he alleges, of a purchase of all of the property and franchises of that corporation at a sale under an execution obtained by him against the corporation, he being the purchaser at such sale.

The State, while denying the validity of any such sale under the statutes of this State, affirms that it is immaterial what passed at said sale; that the State had a lien upon all of the property and franchises of the corporation; that this lien existed anterior to the rendition of the judgment; that such lien is and was admitted by the corporation; that Holland can claim only through the company; that he takes by his sale, if anything, the interest of the defendant in execution, and no more.

I do not propose to determine whether such sale as defendant Holland claims was here had was void, or was authorized by the statutes of this State, and upon this subject will simply say that this is an open question in this State. The determination of this question is not necessary to the disposition of this case, and I examine the case upon the hypothesis that such sale can be had, this being all that the appellant here can or does ask in this respect.

*Randall, C. J., and Van Valkenberg, J., had been counsel in the case, and Judges Bryson and Goss were called in.

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While the entire court agrees with me as to the equities and present status of the State, and as to the propriety and necessity of determining her rights in the premises, yet the other members of the court go further, and decide whether such sale, as is claimed was here had, was authorized by the statutes. Upon this question I express no opinion further than to say that the general rule is that such sale cannot be had unless it is authorized by statute. As to the effect of the statutes of this State I express no opinion.

Do the facts, which the State sets up in the complaints, original and supplemental, and not put in issue by defendant, Holland, show equities which entitle it to a sale of the property and franchises of this corporation, and the application of the proceeds to the payment of the indebtedness alleged, notwithstanding the purchase by Holland?

The effect of such a sale as is claimed was here had by Holland, when viewed in reference to the rights of parties holding a prior and paramount lien, differs in no essential point from other sales of property under junior securities or liens.

In speaking of precisely such sale as Holland here claims was had, that is, the sale of all the property and franchises of a corporation by a judgment creditor under a statutory power, and in determining its effect with reference to prior liens upon the property or equities against the judgment debtor, Mr. Justice Bradley, speaking for the Supreme Court of the United States (11 Wall., 476 and 477) says: "A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property; and we all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter." "If the company are estopped, then those who purchase the property of the company at an execution sale must be estopped.

It has frequently been held that such a purchaser takes only the right, title and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered." This doctrine as to ordinary sales of land by judgment creditors, the plaintiff in execution being the purchaser, is universally acknowledged by all the States. In the case just referred to, it is applied to precisely such sale as is claimed was here had. "The purchaser has a right to what he gets and sells," and nothing more. *Caveat emptor* is the rule. He takes only the interest of the defendant. If the defendant has no interest, then the buyer gets nothing. (McGee vs. Ellis, 4 Litt. 244; 18 Vmt. 390; 4 Dev. & Batt. 160; 4 Litt. 244; 14 Vmt. 325.)

If, therefore, the State has any equitable lien superior and prior to Holland, and this lien is in a condition to be enforced and no good defense to the action is urged, that is an end of the case. To this question I address myself.

The claim of the State arises from bonds of the Jacksonville, Pensacola & Mobile Railroad Company, which were exchanged by the company with the State for bonds of the State. This exchange was made under the provision of an act entitled "An act to alter and amend an act entitled an act to Perfect the Public Works of the State, approved June 24, 1869; approved January 28, 1870." This act provided: "That in order to aid the said Jacksonville, Pensacola & Mobile Railroad Company to complete, equip, and maintain its road, and to aid in perfecting one of the public works embraced in the internal improvements of the State, the Governor of the State is hereby directed to deliver to the President of the said company coupon bonds of the State to an amount equal to sixteen thousand dollars per mile for the whole line of road and length of railway owned by or belonging to said Jacksonville, Pensacola & Mobile Railroad Company in exchange for first-mortgage bonds of said railroad company of the denomination of one thousand dollars.

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when the President thereof shall certify upon his oath that the road or parts of road for which he asks for an exchange of bonds is completed and is in good running order. The said bonds shall be of the denomination of one thousand dollars, signed by the Governor, countersigned by the Treasurer, sealed with the great seal of the State; shall bear eight per cent. interest, payable semi-annually, and shall be payable to bearer. They shall be dated on the first day of January, A. D. 1870, and shall be due thirty years thereafter, and principal and interest shall be payable at such place in the city of New York as the Governor shall designate. The coupons for interest shall be payable to bearer, and shall be authenticated by the written or engraved signature of the Treasurer: *Provided, however, That whenever the Jacksonville, Pensacola & Mobile Railroad Company shall or may determine to pay the interest in gold for or upon their bonds, or the bonds designated in the tenth section of an act entitled an act to Perfect the Public Works of the State, approved June 24, 1869, upon giving notice to the Governor of such intention, then the State bonds aforesaid and the coupons for interest on said bonds shall be payable in gold, notice of which shall be given by the Governor in some paper published in the city of New York and at the capital of this State, to be designated by the Governor.*

The 10th section of the act of June 24, 1869, provided that "in exchange for the bonds of the State above described, the President of the company shall deliver to the Governor of the State coupon bonds of the company, bearing a like rate of interest, payable to the State of Florida, authenticated by the written or engraved signature of the President. The bonds shall be of such denomination, not less than one thousand dollars, as the said company may choose, and principal and interest shall be payable at the same time and place as the aforesaid State bonds."

The act of 28th January, 1870, provided: "To secure the principal and interest of the said company bonds, the State

of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered on the part of the road, for which the State bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line, which it may now have, or may hereafter acquire, together with all the rights, franchises, and powers thereto belonging, and in case of failure of the company to pay either principal or interest of its bonds, or any part thereof, for twelve months after the same shall become due, it shall be lawful for the Governor to enter upon and take possession of said property and franchises, and sell the same at public auction, after having first given ninety days' notice, by public advertisement, in at least one newspaper published in each of the following places: The city of New York, in the State of New York; the city of Savannah, in the State of Georgia; and the city of Tallahassee, in the State of Florida, for lawful money of the United States, and for nothing else, except that the State, for its own protection, may become the purchaser at said sale, and may pay on said purchase any evidences of indebtedness the State may hold against said road, which purchase money, or said evidences of indebtedness, shall be paid on the day of sale into the Treasury of this State, or within ten days thereafter; and all moneys arising from said sale, and paid into the Treasury of this State, as heretofore prescribed, shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State of Florida under this act; and in case the holders of said bonds do not present them for redemption within ninety days after said sale, the Treasurer shall invest the same, or any part thereof, which may be remaining in his hands, in the securities of the United States, to be held by the State of Florida, as Trustee for the bondholders, until said bondholders shall demand the same, upon which demand the Treasurer shall immediately turn over or pay said securities to the bondholders. The

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purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges, and franchises of said defaulting company, together with the franchise of use and being a body politic; and the Governor shall, upon the payment of the said purchase money into the Treasury of this State, as above provided, immediately cause the purchaser or purchasers of said road, at said sale, to be placed in the actual possession, use, and enjoyment thereof, and cause all the books, papers, and real and personal property of said company of every description, together with the franchise of use and being a body politic and corporate; and may use any new corporate name they see fit, and make and use a new seal, upon signifying their action in writing to the Governor, and thereafter may exercise all the rights of a body corporate, and privileges thereof, and of said defaulting company, under said new name for the term of thirty-five years, to date from the time of the purchase as aforesaid. That any such sale shall be ratified by the Legislature before the same shall become effective."

This act further provided: "That the Governor shall, for the purpose of further aiding said Jacksonville, Pensacola & Mobile Railroad Company in the speedy construction of its road, deliver to the President of the said company coupon bonds of this State, of the same character as those above described in this act, to the amount of sixteen thousand dollars per mile, upon receiving for and from the President of said company first mortgage bonds of like amount, or any part or portion of the road between Quincy and Jacksonville: *Provided, however,* The State bonds under this section shall not be exchanged for first mortgage bonds for a greater length than one hundred miles of any part of railroad between Quincy and Jacksonville: *Provided,* The said railroad company or companies shall not issue first mortgage bonds to a greater amount than sixteen thousand dollars per mile."

The first question which arises in reference to this legisla-

tion is whether it was within the power of the Legislature to issue the bonds here authorized to be issued. The Constitution authorizes the Legislature to issue bonds "for securing the debt, for the erection of State buildings, support of State institutions, and perfecting public works." This court has already determined and decided that this clause in the Constitution is a limitation upon the power of the Legislature in the matter of issuing State bonds.

In *Cheney, et ux., vs. Jones*, 14 Fla., 587, this court, in construing this clause, said: "The power of the Legislature of this State over the subject of issuing State bonds is limited by the provisions of the Constitution, because it has prescribed the several subjects and occasions for and upon which the Legislature may authorize their issue." "It is not necessary that a limitation of power should be framed in express terms. If a power is granted to do certain things, as, for instance, the levying of taxes for certain specified and enumerated purposes, and it is not *essential* to the carrying out of the purposes of the government that any such power should be exercised, except for the purposes specified, the effect of such prescriptions is equally prohibitory as to the purposes not specified, as though the prohibition were declared in affirmative terms. (Cool. Con. Lins. 64, 87, 176; 15 N. Y. R. 543; 30 Iowa, 9; 13 Mich. 127, 158; 21 Pen. St. 147; 1 Story's Con. Sec. 448.)" In speaking of the power to issue bonds, a question involved in the case, the court said: "And as to the power to issue bonds of the State the Constitution provides that the Legislature shall have power for issuing State bonds, bearing interest, for securing the debt, and for the erection of State buildings, support of State institutions, and perfecting public works, and by the same rule founded in principle, and sustained by authority in unbroken currents, it is equally prohibitory as though it should declare that the Legislature shall have no power to provide for the issue of bonds, except for securing the debt," &c.

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"The power of the Legislature to issue bonds was circumscribed and limited to the issuing of bonds for securing existing public indebtedness, the erection of State buildings, the support of State institutions, and perfecting public works. The Constitution has specified these as the objects for which bonds may be authorized. The purpose and intent of the Constitution must have been to limit the exercise of the legislative power upon this subject, for we must impute to it some purpose, and some object to be accomplished by it. If that was not the object, we must disregard it entirely, for it would be utterly meaningless."

This clause being thus a limitation upon the power of the Legislature, the question next arising is, is the line of road, authorized to be aided by the act, one of the public works, to perfect which the Legislature was authorized to use the credit of the State?

What were these public works? We do not think that this question can be better answered than in the language of the Justices of this court, in reply to an Executive communication, bearing date the 6th of February, A. D. 1871. (13 Fla. 699.)

Two of the questions propounded in the Executive communication of the 6th of February, A. D. 1871, were: "Are railroads public works referred to by the Constitution? Has the Legislature power, under our Constitution, to aid in the construction and completion of these public works?" To the first question Chief Justice Randall replied (13 Fla. 721): "I answer that, according to the common idea as to what a railroad is, they are public works. They are constructed, whether by the State or the citizen, for the use and convenience of the public for purposes of travel, of facilitating commerce and commercial and social intercourse, of affording markets for all the productions of the country. They enhance values, encourage and promote immigration, increase the extent of productive agriculture, and are like natural streams—public necessities, the highways upon

which all may travel and transact business, access to them being open to all the people on equal terms, and can be denied to none. The action of the several branches of the Government of this State, in reference to railroads and like enterprises, and in view of which action the terms of the Constitution were doubtless used, have given us an unmistakable guide in determining the meaning of such terms employed in it on this subject as seem to require interpretation."

To the second question, which was, "Has the Legislature power, under our Constitution, to aid in the construction of these public works?" the Chief Justice replied: "This, in the form presented, admits, in my judgment, neither an affirmative nor a negative answer. The language of the Constitution is special. The term 'perfecting' does not mean in its broad sense, 'constructing' public works. If the framers of that instrument had intended that the Legislature might have power to authorize an unlimited bonded indebtedness for the general inauguration and construction of public works, they would not have used *a term which merely includes the completing or finishing works of public utility already authorized and incomplete*. As is suggested by my brother Westcott, and as everybody knows, who has examined the legislation of this State and recognizes the existence of a system of internal improvement, long since inaugurated by the people through the legislative branch of the State Government, this system was in progress of development and completion at the time of the adoption of the Constitution. There was but one system or series of such public measures in progress, and none, I believe, under the exclusive control of the State. My opinion is, that the terms 'perfecting public works' refers strictly to the completion of such public works, including railroads, as were projected and in progress, or partially constructed, at the time of the adoption of that phrase in the fundamental law of the State."

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In answer to the same Executive inquiry I used this language: "The clause, an interpretation of which you desire, is as follows: 'The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt, and for the erection of State buildings, support of State institutions, and perfecting public works.'" Upon the face of this clause it is seen that the term public works is used in contradistinction to State buildings and State institutions. If this is not so, and a public work, within the meaning of the clause, is the same thing as a State institution or building, then the term public works is surplusage—is unnecessary. This court held, in 12 Fla. 205, an early case involving the construction of a clause in the Constitution that such a construction of a clause in the Constitution as made one portion of it surplusage is not to be given, if the clause in question is capable of receiving another intelligent and consistent construction. The term "State building" has a more enlarged signification, indicating, in a limited and strict sense, such institutions as the State establishes to discharge its duty in the matter of the administration of the criminal laws, such as State prisons, as well as such as it establishes to discharge its duty to the unfortunates of society, such as the indigent, insane, the deaf and dumb, the blind, and others in like conditions. The terms "*perfecting public works*," in my opinion, clearly indicate, and mean, that works of a public character, *already commenced, are to be perfected. They indicate something inchoate, something began, but not "perfected," and which should be perfected or finished.* The inquiry at once presents itself, were there any such works of this character and in this condition when the present Constitution was framed? It is unnecessary to cite authorities to show that a clause of this character, in a Constitution framed under the circumstances that our present Constitution received its existence, must be interpreted in the light of the then present conditions of things, as well as with reference to the

past legislative and judicial history of the State in this respect. In the light of the past history of this State, and guided by the action of the Judicial and Legislative Departments of the Government, I inquire, what unperfected public works are here referred to? At once we say that these words cannot, and do not, refer to any works owned exclusively by the State, for there were none such, either commenced or perfected. There was no such thing as a State institution, in its strict sense, existing in the State, to which these terms could be held to apply. What had been the action of the Legislative, Executive and Judicial branches of the Government upon this subject anterior to that time? The first Constitution of this State—the Constitution of 1839—was framed by a body of men of distinguished ability—by men who knew what were the proper functions and the legitimate powers of a State in the complex system of government obtaining in this country—by men who understood as well the State's proper relations to the General Government as they did her duties to her own citizens. Believing, as they no doubt did, that it was the peculiar, if not exclusive province of the State to aid in the construction of internal improvements, the benefits of which should be confined principally to State limits, and that it was proper to invest the Legislative Department of the Government with the discretion of determining what were proper objects of State bounty, they adopted the following clause covering that subject: "A liberal system of internal improvements being essential to the development of the resources of the country shall be encouraged by the Government of this State, and it shall be the duty of the General Assembly, as soon as practicable, to ascertain by law proper objects of improvement in relation to roads, canals and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements." This body having the best reasons (derived from many sources, but particularly from the history of the Ter-

ritory of Florida) for prohibiting the issue of State bonds, or pledging the faith of the State for any purpose of this kind, inserted another clause in that Constitution which provided that "the General Assembly shall not pledge the faith and credit of the State to raise funds in aid of any corporation whatever."

The effect of this Constitution was, therefore, to acknowledge this duty, and, while providing ample power for its discharge, it established such a check as would save the State credit and prevent that financial ruin which generally follows an unlimited power in the Legislature to pledge the credit of the State for such purposes. It could aid by an "application of the funds appropriated," but it could not pledge the faith or credit of the State to raise such funds. In 1845 Congress appropriated for the purpose of internal improvements in this State five hundred thousand acres of land. Notwithstanding this mandate of the organic law and this bounty by Congress, and notwithstanding the fact that Florida nearly equalled in square miles of territory the States of New York, New Jersey and Connecticut, making such improvements a great necessity, no established line of railway affording any considerable facilities to the people of the State was constructed for years. In 1855 a *system* of internal improvements was provided for by an act entitled "An act to provide for an encourage a liberal system of internal improvements in this State." The five hundred thousand acres of land granted for that purpose by Congress, as well as millions of acres of what is known as swamp lands, were constituted a fund for the purpose of internal improvements, and the Legislature designated certain lines of railway and canals as proper improvements to be aided from this fund. Quite a number of cases have been adjudicated in this court, in which the companies entrusted by the State to construct the lines of railway indicated have been parties, and the courts, in speaking of these contemplated improvements, have styled them "great pub-

lic enterprises;" as "enterprises in which the public have interests." This court, in 1862, said that it could not forget that the community have rights in reference to these improvements, and that the happiness and well being of every citizen depends on their preservation. Mr. Justice Walker, of this court, in 1862, speaks of this act as one "inaugurating a great constitutional *system*; a system which has enabled the State of Florida, the weakest in population among her sisters, to build more railroad in the same length of time than any other State in the world." At the time of the adoption of the present Constitution, the system of public improvements had advanced greatly. There were a number of lines of road in operation, but there was a considerable and very important portion unfinished. The highest interest of the State required its completion. With this system incomplete, the capital of the State was reached with difficulty by citizens south and west, and many of the people in the western portion of the State were anxious, for the want of these facilities, combined with other reasons, to become a portion of the State of Alabama. In my opinion these incorporated lines of railway, and the internal improvements contemplated in the system created by the act referred to, were the unperfected public works which the Constitution of 1868 contemplated should be "perfected."

We next inquire: Is the road authorized to be constructed by this act one of the internal improvements designated by the act of January 6, 1855, which organized a State system?

The line of road which the Jacksonville, Pensacola & Mobile Railroad Company was authorized by this act to construct was a railroad from Quincy, Florida, to the dividing line between the States of Florida and Alabama, in the direction of the city of Mobile, Alabama, crossing the Pensacola and Louisville Railroad, with the privilege of continuing the same to Mobile, and of connecting with any railroad running to Mobile.

The internal improvement act, which gives us the lines of

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road and canal which were embraced in the system, provides: "That a line of railroad, from the St. Johns river, at Jacksonville, and the waters of the Pensacola bay, with an extension from suitable points on said line to St. Marks river or Crooked river, at White Bluff, on Apalachicola bay, in Middle Florida, and to the waters of the St. Andrews bay, in West Florida, and a line from Amelia island, on the Atlantic, to the waters of Tampa bay, in South Florida, with an extension to Cedar Keys, in East Florida; also a canal from the waters of the St. Johns river, on Lake Harney, to the waters of Indian river, are proper improvements to be aided from the Internal Improvement Fund."

A reference to the contemporary recommendations of the Executive Department of the State and of the Board of Internal Improvement will give us some light upon the subject,

The Governor, in his message of November 24, 1854, uses this language (Message of the Governor, November 24, 1854, Journals of 1854): "The framers of the Constitution were deeply impressed with the importance of a liberal system of internal improvements, and provided that such a system should be encouraged by our State Government. The time has probably arrived when our duty to ourselves and our constituents requires us to fix upon and adopt a State system, and determine the extent to which we can, as a government, aid in its construction. I feel no hesitation in declaring that, in my judgment, no State system will be worthy of the name which fails to connect Fernandina, or some other equally accessible point on our Atlantic coast, with Tampa bay in the south, and Pensacola bay in the west. These two, as great main trunks, would form the basis of a system which would be worthy of the sea-girt State."

On the 22d of December, 1854, the Board of Internal Improvement made a report to the General Assembly, in which they say: "We have thought it best to recommend the concentration of these means upon a system of improvements, having reference to the wants of general commerce as well

as local necessity, for the growth of the State in population and wealth being thus most rapidly developed, the means necessary for local connections and improvements would very soon be produced. The system we recommend for aid consists of a railroad between the waters of Escambia bay and the St. Johns river, at Jacksonville, with an extension from suitable points on the line of the waters of St. Andrews bay, in West Florida, and the St. Marks river, in Middle Florida, and from Amelia island, on the Atlantic, to the waters of Tampa bay, in South Florida, with an extension to Cedar Key, in East Florida, and to connect the country east of the St. Johns with the system, and thus to comprehend that section more fully in its benefits, we recommend, also, the construction of a canal to connect Indian river with the St. Johns. In adopting a system, it was necessary to ascertain if we possessed within our own borders suitable harbors upon the two seas for the accommodation of the commerce which would pass over our roads, for otherwise it would be necessary to point our improvements to suitable connections with the system of our neighboring States." After mentioning Pensacola and Fernandina as suitable harbors, and particulars as to depth of water, &c., the board then state: "We have felt justified, therefore, in resting our system upon ports located within our own limits."

The act of Congress of May 17, 1856, which proposed to aid this system, extended aid for the construction of a railroad from St. Johns river, at Jacksonville, to the waters of Escambia bay, at or near Pensacola. The then Constitution of the State directed that a liberal system of internal improvements should be encouraged by the government of this State. Thus we find, from a simple examination of the statutes, that when the Constitution of 1868 was adopted, there was no public work authorized from Quincy to Mobile, or to the Alabama line in the direction of Mobile, and we find that it was the purpose of this legislation to secure a State

system with the terminal points of the several roads at harbors within the State.

It may be said that a large portion of the road to be constructed by the Jacksonville, Pensacola & Mobile Railroad Company is in the direction of Escambia bay, but, upon mature reflection, I do not think that the Constitution can be held to sanction aid to an enterprise of this character to the Alabama line in the direction of Mobile, notwithstanding a part of the line might be available in reaching the waters of Escambia bay. Such a material change as this in a railway charter would release the subscribers to stock from any obligation to pay calls. It would be a fundamental alteration, as distinguished from an alteration only auxiliary to the main design. (1 N. H. 44; 11 Ga. 438; 29 Vmt. 545; 8 Mass. 268; 18 Ib. 384; 13 Beav. 7; 3 Eng. Law & Eq. 144; 10 Beav. 1; 9 Fla. 311.)

No one at all conversant with the history of the internal improvement system of this State can hesitate to say that a line of road from Quincy to Mobile was not embraced in that system. The object and purpose of the authors of that system was to restrict the terminal points of the lines of railway to harbors in the State, and changing these terminal points, looking to connections with Mobile, is a fundamental and material alteration. The charter of an ordinary private corporation is a limitation upon the power of the Legislature and the company, when either proposes to act with reference to the shareholder, and it cannot be denied that such a change as is here made would release him from calls. The Constitution here is a limitation upon the power of the Legislature when it proposes to pledge the credit of the State or bind her people by the issue of bonds. I think the nature of the subject to which the limitation applies is such as to require a liberal construction in behalf of the people, and that no act of the Legislature which pledges the credit of the State and involves a resort to taxation should receive judicial sanction where there is such a difference as here exists between

what the Legislature is authorized to do and what it has done. The limitation must receive a reasonable construction, and while I admit and approve of the general rule that the legislative construction of the Constitution is entitled to great weight, yet in a case of clear error, as I deem this to be, the duty of the judiciary is plain.

The Legislature must be held to some limitation in the matter, and looking to the executive, legislative and judicial history of the State, it is too clear for doubt that a line of road from Quincy to Mobile cannot be held to be a public work within the meaning of the Constitution, as it has been heretofore defined by the justices of this court. Such a road is beyond and outside of the general scope and design of the original enterprise, and the Constitution does not authorize the Legislature to aid any other railway than those embraced in the then existing system. It may be said that the road to Mobile will be of much greater benefit to the people, and other suggestions of like character may be made. With questions of policy of this character this court has nothing to do, and they should not and do not weigh one grain in reaching a conclusion. The bonds of the State of Florida here authorized to be issued are, therefore, unconstitutional. The power of the Legislature is limited in this respect, and the bond here sanctioned is not embraced within the limitation. One of the consequences of this is that neither the State nor her people are bound for the bonds now in the hands of those who hold them. No doctrine of estoppel can operate against the State.

It is contended upon the part of defendant Holland that another consequence is that there is no lien upon the property and franchises of the company which can be enforced at the suit of the State; that with the failure of its obligation there is a failure of any equity existing in its behalf; that there is no consideration from the State to the railroad. We will not here repeat the various sections of the law which define the relation of the State, of the foreign bondholder,

and of the company towards each other. A careful and strict examination of this statute will show that the State of Florida was to occupy two distinct and different relations to the holders of the State bond and to the company. The first relation was that of primary debtor to the holder of the State bond, under and by virtue of the obligation of this bond, and also of mortgage creditor of the company, under and by virtue of the bond of the company. The right of the State, viewed in this light, was to be simply that of a mortgage creditor of the road, and its liability to the holder of the State bond was that of a simple bond debtor. In this relation the holder of the State bond was to have no security for his protection and payment except the liability of the State in its own right and its good faith and capacity; the State at the same time as a result of this relation being given, for its own protection against this bond debt, the right to become the purchaser at the sale of the road and to pay for it in the bonds of the company. The other relation which it was to occupy was, in the language of the act, "a trustee" for the holders of the State bonds. In this relation the lien created by the statute was for the benefit of the holder of the State bonds. The proceeds of the sale, if he declined to surrender his bonds, were to be invested for him, and he was to have the beneficial interest of a *cestui que trust*. The lien of the statute and the company bond, viewed in this light, was for his benefit, and the property and franchises of the company were to be his security for payment. And as the company received his money and the State received nothing, the company was to be held to the obligation of common honesty in the matter of payment and satisfaction. There are other things in this statute besides the express declaration that the State is a trustee which sanction this view of the State's relation. The company could, by its own act, change the nature of the claim of the State bondholders for interest to that of a gold-bearing bond. The act provides no special method for the payment of the State bond and inter-

est as distinct from the liability of the company to the State, and it is apparent that the State herself was to look to the company for the interest which the bondholder was to receive. All of these things show that the State was to be the instrument or trustee through whom a liability of the company to the bondholder should be discharged. This, coupled with the express declaration of the statute, leaves no doubt of this additional relation of the State. To this relation I know of no constitutional objection. There being no primary liability of the State, it would seem to be a consequence that such portions of the act as exists for its protection against such liability as the Legislature presumed the State incurred, would fail and cease to be operative, and I am inclined to this view. But, however this may be, the recent amendment to the Constitution of the State prohibits the State from becoming any such owner or stockholder in a corporation as the statute authorizes the purchaser to become in this case. That amendment (Article XIII.) provides that "the credit of the State shall not be pledged or bound to any individual, company, corporation or association, *nor shall the State become a joint-owner or stockholder in any company, association or corporation.*" What is meant here by the terms "joint-owner or stockholder in a corporation?" Such terms as these, when used in reference to the State, are not applicable to strictly public corporations, such as are founded by government for public political purposes, as towns, cities, parishes and counties, because such a thing as the State becoming a stockholder, or part owner in such a corporation, is impossible from the very nature of the relation between such corporations and the State. The term *part owner* of a corporation is also rather indefinite, unless the word corporation is used here in the same sense as franchise. Says Mr. Justice Blackstone, (2 Com. 37): "It is a franchise for a number of persons to be incorporated and exist as a body politic with a power maintain perpetual succession and to do corporate acts, and each individual of such corporation is

said to have a franchise or freedom." This clause clearly prohibits the State from becoming a part owner of the franchise to be a corporation, and other franchises appertaining to corporations for ordinary, commercial and business purposes, such as a company with power to operate a line of railway or bank. Where the capital stock in such corporation is owned by private persons, it is a private corporation. The act of the Legislature here would make the State the sole owner of the stock and franchises in the event it became the purchaser, and in such case the result would be simply that the corporation would be a public and not a private corporation, and would be under the control of the Legislature, the same as municipal corporations. There would be no such vested rights of property as are beyond the control of legislative authority. (Dartmouth College case, 4 Wheat. 518.) We cannot, however, see that this can make any difference. The State would be the only and sole stockholder in such corporation, and that is prohibited. The command of the Constitution to the State is that it shall not be a "stockholder *in any* company, association or *corporation*." The prohibition extends as well to a public corporation of this character as to a private one. And it is well that it does, for such a corporation, if a source of profit to the State, would be a fund to tempt her officers, and if it resulted in loss, would be a burden to her people, unless they hoisted the flag of repudiation behind the shield of sovereignty. Those who administer a government and exercise powers executive, legislative and judicial, appertaining thereto, can well be prohibited from running and operating railways, banks and other commercial institutions. If these persons perform honestly and properly the trust of administering the government, the people will be satisfied. In this amendment, the people have said that such persons shall not, as their representatives, involve them in such undertakings.

Having thus defined the status of the State, and her general rights as trustee under the statute, it is only necessary

to consider the questions presented by the particular pleadings in the case to ascertain whether the State's equities are now operative.

The complaint alleges an exchange of bonds by the J. P. & M. Railroad Company and the State to the amount of three millions of dollars on that part of the road which defendant Holland claims to have purchased under a *fi. fa.*, the complaint alleging that this exchange was made at the rate of \$16,000 per mile in bonds. That before such exchange the President of the road filed with the Governor of the State the certificate required by the act. The amended complaint of June 22, 1872, alleges non-payment of the interest on the State bonds, and that on the first of July, A. D. 1870, there was due as interest on the bonds of the company held by the State the sum of \$120,000, and that on the first day of July, A. D. 1872, there will be a further sum of \$160,000, which will have remained due and unpaid twelve months. Defendant Holland was brought into the case by a supplemental complaint filed March 24, 1874. This complaint states that Holland recovered his judgment since the commencement of this action, and that his sale was had while this suit was pending. The supplemental complaint alleges also that none of the interest accrued upon the bonds of the company, nor upon the bonds held by the State, has been paid since the commencement of this suit, which was about two years. The answer of defendant Holland consists of several statements of fact as defenses to the action.

The first three state the obtaining of his execution, his sale and purchase. He admits the previous execution and exchange of bonds as stated in the complaint. The fourth denies the execution by the J. P. & M. Company of any mortgage or deed of trust to the State to secure any of the bonds, and affirms that the mere execution by the company of the bond to the State did not create any lien, as well as that there was no constitutional power in the State (Legislature) to issue such bonds.

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The act of the Legislature did not require at the hands of the company the execution of a formal mortgage or deed of trust in addition to its bond. The Legislature provided for a simple company bond, and declared that the State of Florida should, "by this act," have a statutory lien to secure the principal and interest of the said company bonds, which shall be valid to all intents and purposes as a first mortgage duly registered on the part of the road for which the State bonds were delivered. There was to be this statutory mortgage lien attached to the bond of the company in the hands of the State, and it was not contemplated that the company should execute a mortgage or deed of trust in addition to its bond. As to the matter of the constitutionality of the State bonds, we have already seen that while this may relieve the State from any obligation as a debtor, it does not relieve the company or the property in the hands of Holland, where it is affected by all the equities affecting it, when in the control of the company.

The fifth ground of defense states that the Governor of Florida has never designated any place in the city of New York where the bonds or coupons of the State might be paid. The act provides that the principal and interest of the State bonds should be payable at such place in the city of New York as the Governor shall designate, and that the coupon of the company bond shall be payable at the same place. The failure of the State to designate a place in New York for such payment does not constitute a defense to the action upon the part of the company or Holland. What is to be paid here is the coupon upon a bond authorized by a statute, and it is now well settled that such coupons have the incidents of negotiable commercial paper. Holland, while not denying that this interest is due, makes no tender of the money or offer of payment, nor does he allege that he was ever ready to pay at any time or place. The fact that no place has been designated does not excuse him from payment when demand is made through an action at

law or suit in equity. In ordinary cases of indebtedness even a tender and refusal of the sum due at the time and place where payable does not constitute a defense to the action. Such tender would not bar the debt. It could be pleaded only with a *profert in curia* of the money—17 Mass. 392; 14 Fla. 247.

The sixth alleges that the company was not in default in the payment of its interest when this action was commenced, because the company had paid the corresponding coupon upon the State bond. If the allegation was that the interest due upon the State bonds, as set up in the original, amended and supplemental complaints, had been paid by the company, the defense might have been good, viewing the State as a trustee, but the defense is only partial. The supplemental complaint against Holland, filed two years after the commencement of the action, sets up a default in non-payment of interest both by the company and State for this period. Neither the company nor Holland deny this default, and it is sufficient to give the right of action to the trustee.

The seventh defense has reference to the claim of the Trustees of the Internal Improvement Fund under the bonds issued under the internal improvement act of 1855.

The eighth denies that Greeley was ever legally in the possession of the road, and admits that the Jacksonville, Pensacola and Mobile Railroad Company was a corporation. It is only necessary to mention these facts to see that they constitute no defense.

The ninth alleges that the State of Florida "never in legal effect" issued or delivered a State bond. The bare naked statement of a legal opinion entertained by a pleader, as to facts not alleged as a matter of defense, amounts to nothing. So far as this proposes to set up the want of power in the Legislature to authorize the issue of the State bonds, the demurrer reaches that point by the simple statement in the complaint of the fact that they were issued,

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and the legality of their issue is raised properly by the demurrer, and is improperly attempted to be raised by an answer stating the presumed "legal effect" of the act of issuing them.

The tenth alleges that the President of the Jacksonville, Pensacola and Mobile Railroad Company never made the certificate under oath required by the act of 1870, as preliminary to the issue of the bonds. The complaint alleges that such certificate was made. The issue made is immaterial. If the company received the State bonds and gave its own, neither it nor Holland can now be heard to urge its own default in the simple matter of failure to give a formal certificate. The company has had the benefit of everything it would have got with it, and it and Holland must be held to the corresponding liability.

This ends the consideration of the defenses set up in the answer of Holland. None of them constitute a defense to the action.

Objections to the levy and sale in this case have occurred to me, but I have not stated them, wishing, as far as this court was concerned, that we should take as broad a view of the whole matter as possible in order to the speedy conclusion of this controversy.

No question of jurisdiction has been raised by the pleadings or presented in the argument in this case. It is apparent from the pleadings that the road is now in the possession of the receiver of the Supreme Court of the United States. Upon the case made upon the demurrer, Holland having answered, and being within the jurisdiction of the Circuit Court of Duval county, the State has a clear equity to perpetually enjoin him from obstructing, or in any manner hindering, the Governor of the State from entering upon, taking possession of, and selling the road, in accordance with the terms of the statutes as in this opinion defined.

No question of priority of liens as between the bonds is-

sued under the internal improvement act, and the State, is involved or considered upon this appeal.

The judgment of the Circuit Court upon the demurrer should be affirmed.

BRYSON concurring:

The first question for us to decide is, has Holland any interest in the subject-matter of this suit? He alleges in his answer that he purchased the franchise of the Jacksonville, Pensacola & Mobile Railroad Company, or, at least, the equity of redemption. To this allegation there is a demurrer, which was sustained in the court below, and upon which this appeal is prosecuted. The demurrer then admits the facts and raises the issue of law, which it is our duty to decide. That a franchise cannot be sold under a *fi. fa.* has been determined so often, at least in this country, that there cannot be any better settled principle of law found. It is true that there is not any decision in our State, but the Supreme Court of the United States has decided this question; and Judge Taney, in delivering the opinion in the case of Robert Gue vs. Tide Water Canal Company, 24 Howard, 257, says: "A corporate franchise to take tolls on a canal cannot be seized and sold under a *fi. fa.*, unless authorized by a statute of the State which granted the act of incorporation." And it will be seen that there is no such statute in this State.

Again he says: "Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise." *Ib.*

In a North Carolina case the court holds: "We agree that the franchise itself cannot be sold." (5 Dev., 306, State vs. Reives.) The court in this case decided that the land upon which the road is built could be sold under a *fi. fa.*, for the reason that the Legislature has made no other provision by which debts could be collected, and say: "We

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regret sincerely that it has hitherto escaped the attention of these companies and of the Legislature that some act was necessary in order that such sales, when unavoidable, might be made with the least loss to the debtors and the greatest advantage to the creditors and purchasers, by providing for keeping the franchise with the estate. Or, if it so please the Legislature, an act might provide for putting the road into the hands of a receiver, and subjecting the income to the creditors, instead of the estate in the land stripped of the franchise. But nothing of this kind has been done." *State vs. Reives*, 5 Dev. 307.

But it will be seen that the Legislature of Florida had made such provisions, and pointed out the manner in which a judgment creditor could collect his debt after he had obtained a judgment. (Acts of 1870, sec. 374, amended in 1871, pamphlet, p. 13, 1832.) And it is a well settled principle that, when a statute prescribes the manner in which a debt should be collected from a corporation, the statute must be strictly pursued. It will be seen that the decision in *North Carolina* was made in 1844, long before the decision in 24 *Howard*, 257, and has long since been overruled in the *North Carolina* court and the ruling in 24 *Howard* sustained, and that it is now settled that even a worn-out rail and timber necessary for the repairs of the road are exempt from levy and sale. (2 *Redfield on Railways*, 543, note, and authorities referred to there.) Thus it clearly appears that the franchise, or anything which is necessary to the enjoyment of all the rights pertaining thereto, cannot be sold under an execution.

But the defendant, *Holland*, says he purchased the equity of redemption. If it could be possible that the equity of redemption could be sold under an execution, when the thing itself could not, before making the mortgage or deed of trust, it must be by statute, and we have no statute in this State authorizing the sale of the franchise or the equity of redemption in a franchise. It will be seen that we have a statute

authorizing the sale of the equity of redemption in property already subject to sale, but surely that cannot be construed to authorize the sale of the equity of redemption in property not subject to levy and sale. (Thomp. Dig. 355-6.) This statute is in derogation of the common law, and must be strictly pursued. The demurrer raises this question, and it was as much the duty of Holland to show that the statute had been complied with as it was to show that he had an execution. It will be seen that Holland does not allege in his answer that the statute has been complied with. Mr. Redfield, in his valuable work, "The Law of Railways," published in 1867, could only find one case where a sale of the equity of redemption in a railroad corporation had been sustained; but he does not tell us whether that was by virtue of a statute authorizing the sale of the equity of redemption in a railroad corporation, and I have not been able to get the report of the case. (Wood vs. Goodwin, 49 Maine R. 260; 2 Redfield on the Law of Railways, 546.) Then, as the statute authorizing the sale of the equity of redemption does not authorize the sale of the equity of redemption in a railroad corporation, and the requirements of the statute have not been complied with, it certainly cannot be maintained that Holland acquired any title under his sale and purchase, and, for that reason, the demurrer must be sustained, and the judgment of the court below affirmed.

The only other question which I desire to express an opinion upon, is, the constitutionality of the bonds issued and delivered by the State to the Jacksonville, Pensacola & Mobile Railroad Company. I have reached the same conclusion as Justice Westcott, but desire to give my own reasons. The Supreme Court of the United States very properly remark, "this is a delicate question," and all the circumstances surrounding and connected with this case render it a complicated and *very* delicate question. As that court remark, the judges of this court gave an official opinion, which was generally considered favorable to the constitutionality of these

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bonds, and two of those judges are not here to speak for themselves; one of them has passed away, and the other is disqualified to sit in this cause, and there is the further difficulty, to my mind, that none of the holders of these bonds are before the court, though the State—the trustee—which has the mortgage or first lien upon the road to enable it to finally pay the bonds, is before the court. If the bonds are invalid, they might have come into this court, or the court below, and asked to be subrogated in place and stead of the State, but they have not done so, and they have a right not to do so. There is one aspect of the case which makes it very much the duty of this court to pass, now, upon the validity of these bonds. If the holders were misled by the official opinion given by the justices of this court, they should know it at once, and take hold of whatever security may be in their power, and more especially so in this case, as the railroad, if they should see proper to resort to that, is deteriorating in value every day.

The question to be decided, then, is, is the act of the Legislature authorizing the Governor of the State to issue and deliver to the Jacksonville, Pensacola & Mobile Railroad Company the bonds of the State constitutional, and that must be done by reference to the statute and Constitution of 1868.

The Constitution of 1868, Section 7, Article XII., authorized the Legislature to provide for issuing bonds of the State, bearing interest, for securing the debt of the State, and for the erection of State buildings, support of State institutions, and *perfecting* the public works.

I think it may be conceded that perfecting the public works means, and was intended to mean, the uncompleted railroads and canal, designated as such by the internal improvement act of January, 1855.

The whole course of legislation then, and since that time, has so treated that system, and these roads as the public works of the State, because they were aided by the State

Then the sole question here is, is the Jacksonville, Pensacola and Mobile Railroad one of these public works, designated by that act—I mean the act of the 6th of January, 1855? Two corporations accepted the provisions of that act, which were authorized to construct a road from the Apalachicola river west. The Pensacola and Georgia Railroad Company was to commence at the city of Pensacola, or some point on the Pensacola bay, running eastwardly to some point on the Georgia line. The other, the Florida, Atlantic and Gulf Central Railroad, to commence in East Florida, upon some tributary of the Atlantic ocean, within the limits of the State of Florida, and run through the State to some point, bay, arm, or tributary of the Gulf of Mexico, west of the Apalachicola river, in West Florida. .

The internal improvement act provided that a railroad be built from the St. Johns river, at Jacksonville, to the waters of Pensacola bay, with an extension, at suitable points on said line, to St. Marks, or Crooked river at White Bluff, and Apalachicola bay in Middle Florida, and the waters of St. Andrew's bay in West Florida, &c. (Act of 1855, page 11, pamphlet.) The charter of the Jacksonville, Pensacola and Mobile Railroad, as amended, is "to build a road from the terminus of the late Pensacola and Georgia Railroad, now the Tallahassee Railroad, at Quincy, to the boundary line between the States of Florida and Alabama," &c. (Amended act of 1870.) It cannot be pretended that this is the terminus or starting point of either line of railroad which did accept the provisions of the internal improvement act.

The Jacksonville, Pensacola and Mobile Railroad does not mention the city of Pensacola or Pensacola bay, which are cardinal points in the Pensacola and Georgia charter, neither does it touch the Gulf of Mexico west of the Apalachicola river in West Florida, neither does it touch the cardinal point mentioned in the internal improvement act, the waters of the Pensacola bay, but runs north of that city

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and bay, and extending to the Alabama line. It is very clear that part of this line and terminus is not named in the internal improvement act, or in the charter of either of the roads which had accepted the provisions of that act. Now it is very well remembered by some of us what induced the Legislature to make the City of Pensacola, or Pensacola bay, or the Gulf of Mexico, west of Apalachicola river, in the State of Florida, cardinal points in their charters, and in the internal improvement act.

It was contended then, whether it appears or not, I cannot tell, in the proceedings of the Legislature, that the State of Florida had natural advantages which she did not intend that others should enjoy, at least until her system, as inaugurated, was permanently established.

These are reasons that did or might have actuated the Legislature in establishing these particular cardinal points, and if it had not been done, might have defeated the whole system. But is this a sufficient deviation from the original system to put it beyond the power of the Legislature to extend the aid to the Jacksonville, Pensacola and Mobile Railroad Company? I think, under the reasons and holding of the courts in analogous cases, it is; for there is nothing like the present case to be found in the books, though the courts have time and again decided what variation from the original route or terminus would exonerate a previous subscriber from the payment for his stock.

The Supreme Court of the United States, in the case of *Marsh vs. Fulton county*, 10 Wall. 676, held that a subscriber to stock and issues of county bonds, authorized upon the vote of the people of the county, to the organized corporation, could not be legally made to pay their subscription to one of three roads made out of the one. Mr. Redfield uses this language in his work on the law of railways: There can be no doubt that the subscribers to the stock of a railway company are released from their obligation to pay calls by the fundamental alteration of the charter. (1 Red-

field on the Law of Railways, page 193, and cases referred to there; 11 Ga. 438; 5 Hill, 383.)

"If a person subscribes for the purpose of building a railroad between two given points, and this project is abandoned, the person is not liable to another company, who are authorized by an act of the Legislature to impose such subscription for another purpose, such act not being in the power of the Legislature to grant." (Angel and Ames on Corporations, Sec. 542; Pittsburg & C. R. R. Co. vs. Gazzan, 32 Penn. State, 340.) The authorities of this kind might be multiplied to almost an indefinite number, but it is deemed unnecessary.

For the reason that this is a deviation from the system of internal improvement inaugurated by the internal improvement act, it clearly appearing that the charter to the Jacksonville, Pensacola and Mobile Railroad Company is for a different terminus, and part of the line entirely a different road from what was organized as the system of internal improvement in this State, and therefore cannot be considered as a part of that system.

In addition to all this, is there one word in the State Constitution, or in the advisory opinions of the Judges, which can be construed or tortured into the construction that the Legislature had power to authorize the *exchange* of the State bonds on a completed railroad?

"SECTION 7. The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt of the State, or for the erection of State buildings, support of State institutions, and perfecting public works."

There is not one word in the Constitution which can be *twisted* into a construction that the Legislature might provide for issuing the bonds of the State in exchange for the bonds of the railroad company, to aid it to maintain its road, or for any other purpose than the completion of the system inaugurated by the internal improvement act.

The act under which these State bonds were issued pro-

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vided merely for an exchange or barter for the bonds of the railroad company, and no where contains any provision for the application of the State bonds, or their proceeds, to the purpose of perfecting any railroad or other public work. It is in substance and effect an attempt to endorse the bonds of a road already built—a thing not contemplated by the Constitution in any aspect. Then is the official opinion of the Judges calculated to mislead any one, or authorize the construction that they were in favor of the validity or constitutionality of these bonds?

As this will be better understood I may be pardoned for copying the inquiry of the Governor and the opinion in full of the Chief Justice.

[The Judge here read the advisory opinion of Chief Justice Randall in 13 Fla., 719.]

The question of the validity of these bonds was not before the Justices at the time they gave their advisory opinion. Now can there be found anything in this opinion which might lead to the conclusion that the bonds in question could be authorized to be issued by the Legislature? To my mind it is clear it is not.

I have copied and used the opinion of Judge Randall because Judge Wescott is here and fully able to speak for himself, and has done so. I do not copy the opinion of Judge Hart, because he has passed away, and his opinion is very short, and fully agrees with the gist of the other opinions.

For these reasons, and those of Judge Westcott's so logically and properly given, and with which I fully agree, I am compeled to come to the conclusion that these bonds are invalid, and were issued in violation of the Constitution, and that they are entirely null and void, and that the State is not bound to pay them, and that the State holds the lien upon the road as trustee for those bondholders.

I agree with Mr. Justice Westcott as to the equities and status of the State.

Goss concurring.

I concur with Judge Bryson in his opinion upon the question of the sale of a franchise, and with both the Justices upon the other points decided, and deem it unnecessary to give a separate opinion.

DANIEL P. HOLLAND, APPELLANT, VS. THE STATE OF
FLORIDA, ET AL., RESPONDENTS.

Where an appeal and supersedeas have been effected, the jurisdiction of the appellate court attaches, and that jurisdiction is then exclusive. The respondent here cannot, during the pendency of an appeal, dismiss his case in the Circuit Court, and, by this means, dismiss here the appeal of the appellant.

This is an appeal from the Circuit Court of Duval county. After the case was argued and submitted, the respondent made this motion to dismiss the appeal. The ground of the motion, and the facts upon which based, are stated in the opinion of the court. The report of this motion should have preceded the report of the case, the motion having been heard and disposed of before the opinion and judgment upon the appeal was rendered.

WESTCOTT, J., delivered the opinion of the court.

The respondent alleges four grounds upon which it is claimed that the appeal in this case should be dismissed:

The first is that a decree has been rendered for the respondent in another suit.

Upon an inspection of the opinion and decree in the case of the State of Florida vs. Edward C. Anderson, Jr., *et al.*, in the Supreme Court of the United States, the case referred

to, it appears that the Supreme Court of the United States has not finally passed upon the rights of appellant, Daniel P. Holland. On the contrary, that court has said that its proceedings are ancillary to those in the State courts, and in this statement that court can refer alone to this suit.

In considering the question of the validity of the State bonds, that court remarks that "if it were necessary to do so this court would not hesitate to pass upon that question, but we do not deem it necessary in this suit, which in its nature is rather to be regarded as ancillary to the judicial proceedings adopted by the State of Florida."

In the decree rendered there is an express reservation that "it is not intended to prejudice the right of defendant, Daniel P. Holland, to contest in any competent court of proceeding the vality of the bonds issued by the Jacksonville, Pensacola and Mobile Railroad Company in exchange for the bonds of the State of Florida under the act of the Legislature of said State, passed January 28, 1870, nor to prejudice any right which said Holland may have to redeem said railroad by the payment of the unpaid purchase money mentioned in the said pleadings, with all the interest thereon and lawful charges on said road, in case it should be adjudged that the said bonds are invalid."

It thus appears that the first ground alleged for the motion is in point of fact untrue so far as defendant Holland is concerned. If the action of the Supreme Court of the United States in the suit referred to is to control this court, it is obvious that it is expected that we shall determine finally the rights of the defendant Holland. But however this may be, upon the face of the opinion and decree it clearly appears that it is not a final decree in favor of the State against Daniel P. Holland, the appellant here. Whether if there were such final decree it would be proper for the court to dismiss the appeal of Holland upon respondent's motion, is, therefore, a question not presented for our consideration.

The second ground of the motion is that the case in the court below has been dismissed by the plaintiff in that court, the respondent here, since this appeal was taken by the defendant in the court below.

The respondent presents a duly certified order of the Circuit Court of Duval county, made since the appeal in this cause and the hearing in this court, discontinuing and dismissing the suit in that court as to defendant Daniel P. Holland. No notice was given Holland in the Circuit Court, and he here contests the motion to dismiss his appeal.

The judgment from which this appeal is prosecuted is a judgment sustaining a general demurrer to the answer of defendant, the ground of demurrer being that the answer does not state facts sufficient to constitute any defense in law to the action. This, as to defendant Holland, is a final judgment. This demurrer presented an issue of law; that issue involved the entire defense of Daniel P. Holland, and a judgment sustaining the demurrer determined the whole issue between the parties. It left nothing to be litigated between them. (12 Wall. 98; 5 Wall. 819.) From this judgment this appeal is prosecuted; due notice thereof is given as required by law, and a written agreement, signed by the attorneys of the parties, is filed in this court, that the appeal may be taken by defendant Holland without giving an appeal bond, or undertaking, and that the appeal may be heard on the record agreed to be submitted, and this undertaking and agreement. The Code provides that the perfecting of an appeal, by giving the undertaking here waived, shall stay proceedings, except in certain enumerated cases, among which it is clear this case is not embraced.

The conclusion to which we have arrived in this matter is, that the action of the Circuit Court of Duval county in thus, without notice, dismissing a cause after final decree and after an appeal, which operated as a *supersedeas*, is void. After such an appeal perfected, the jurisdiction of this court attached; that jurisdiction was appellate; the

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whole case was before this court. This jurisdiction was also necessarily exclusive, in so far as its power over the final decree of the Circuit Court was concerned. Appellant Holland has a right to have the merits of that decree reviewed by this court, and to an order dismissing the bill as against him, if there is no equity in it. This would be an express determination in his favor, which is something very different from a simple dismissal of the bill by the plaintiff.

These principles are so elementary and the conclusions stated so plainly and necessarily correct, that we would not, in ordinary cases, make the least reference to authority to sustain them. In view, however, of the importance of this case and the zeal with which this motion has been urged by the State, it is deemed proper so to do here.

The Supreme Court of Tennessee (5 Cold. 647), in a case involving this question, hold and decide "that upon an appeal to that court, and an execution of the bond, the case is immediately transferred to that court, and the court below had after its rise no longer any jurisdiction of the case. The entrance of dismissal in the court below is a nullity."

The Supreme Court of Kentucky (6 J. J. Mar. 353), in speaking of the effect of an appeal upon the power of the court below, say: "An appeal having been taken from it, if it was final, the appellate court could alone reverse or affirm it, and if it were merely interlocutory, an appeal having been taken by consent, shows the determination of the parties to refer the future decision of the controversy to the appellate court, and, from necessity, the action of the Circuit Court would be suspended by the appeal until the appellate court had disposed of it. There could not be a greater absurdity in judicial proceedings than to have a cause progressing at the same time in the inferior and appellate tribunals of this country."

The Supreme Court of Missouri (35 Mo. 515; 41 Mo. 494) say: "After an appeal is prayed for and allowed, the record cannot be changed or altered by either party. An

entry cannot be filed *nunc pro tunc*; and no addition can be made to it. The court below has ceased to have any jurisdiction over it."

The same doctrine prevails in all the States where the direct question has been presented, considered and adjudged. 12 Iowa, 461; 15 Iowa, 445; 8 Cal. 135; 6 Grat. 669; 17 Pick. 142; 20 Pick. 512; 4 Mar. Chy. 267; 1 Fla. 1; 19 La. 168.

The third ground urged for dismissal is because the "case is not embarrassed with any question which might be presented, by an answer setting up counter claim, or cross-bill praying for affirmative relief."

The rule we have announced is general. It embraces cases of counter claim and where affirmative relief is prayed by defendant as well as all others.

The fourth ground urged is that "the State is not bound, nor is the court, to furnish Holland an opportunity in this suit to agitate pure questions of law; he can bring his own suit for this if he desires."

Holland, upon this appeal, has the right, as any other party to an appeal has, "to agitate pure questions of law," as well as questions of fact.

The motion is denied.

ALVIN MAY, APPELLANT, VS. ENOCH J. VANN, ADMINISTRATOR, RESPONDENT.

1. Under a previous decision of this court it is not essential to the validity of a notice by an administrator calling for the presentation of claims against the estate of the intestate, that the precise time fixed by law as the period within which claims should be presented should be stated. While the statute fixes the time of "two years," such notice under this decision is sufficient if it calls for a presentation "within the time prescribed by law." A decision fixing a matter of practice of this character should not be reversed, except for reasons of the most cogent character.

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2. Between co-sureties upon a promissory note, the relation of the debtor and creditor does not exist without payment of the debt by one of the sureties. Such relation cannot be called a claim within the meaning of the statute of non-claim in this State.

Appeal from the Circuit Court for Jefferson county, Second Judicial District.

The opinion of the court contains a statement of the case.

S. Pasco for Appellant.

G. P. Raney for Respondent.

WESTCOTT, J., delivered the opinion of the court.

In this case the administrator published a notice requiring a presentation of claims against the estate of his intestate "within the time prescribed by law." It is insisted that the time prescribed by law is "two years," and that the notice was insufficient in that this precise time was not mentioned therein. The Circuit Court ruled that this notice was sufficient, and the appellant, (the plaintiff below), upon exception and appeal, presents that question for consideration.

Appellant with respondent's intestate was co-sureties upon a note. The holder of the note sued appellant and recovered judgment against him. After the expiration of the two years' notice given by the respondent for the presentation of claims against the estate of his intestate, *and before respondent was discharged as administrator*, appellant paid the judgment and sued the respondent. The question here is, was there such claim against the estate of respondent's intestate *before payment* by appellant as required a presentation to respondent as administrator within the two years. The Circuit Court decided that it was such claim as should have been presented.

These are the two questions which this record presents for consideration.

We first examine the matter of the sufficiency of the notice given.

In the case of Fillyaw vs. Laverty, 3 Fla. 105, the form of the notice was, "All persons having claims against the estate of William D. Harrison, deceased, are hereby warned to present them to the subscriber within the time prescribed by law, or they will be forever barred of recovery; all those indebted to the estate are requested to make immediate payment."

As to this notice the court in that case remark: "It embodies, we think, substantially the requirements of the statute, and although it does not contain the words, 'creditors, legatees and persons entitled to distribution,' still we think the words, 'all persons having any claims against the estate,' are of so comprehensive character that they include and embrace within their meaning, creditors, legatees, and persons entitled to distribution, upon the principle that the major includes the minor. This notice before the court, from its substantial conformity to the requisition of the section containing the statute of non-claim, must be taken by the court as a sufficient compliance, with the proviso of that section." In the case of Ellison, administrator, vs. Allen, 8 Fla. 211, this court remark: "No question was made at the hearing in respect to the sufficiency of the terms in which the notice was couched, and without intending to rule anything on that point we will take occasion to remark that the notice should be ample and full in its terms, and should particularly state the limitation of two years as the period within which the claims are to be presented. In making this remark we do not intend to be understood as coming in conflict with the case of Fillyaw vs. Laverty, where this point as to the sufficiency of the notice was expressly ruled; but we only desire to call attention to its importance, that the construction of the statute may be such that it may be made to subserve its legitimate end and object, to wit: of furnishing full and ample notice to those

who may have just claims or demands against the estate. The material point argued at the hearing, and upon the adjudication of which this cause must mainly depend, involves the question as to the sufficiency of the presentation of the claim sued upon to the administrator."

In the case of *Amos vs. Campbell*, 9 Fla. 199, this court, after remarking that it was not necessary "that we should rule definitely upon the sufficiency of the notice given in this case," quote the language in the case of *Ellison vs. Allen*, but decide the case upon other points.

It is thus seen that this court in these two cases expressly avoid deciding upon the matter of the sufficiency of the notice in these cases, and assert that the matter of the sufficiency of such a notice as we have in this case was "expressly ruled in *Fillyaw vs. Lavery*." In the two cases referred to nothing more was done than to advise the profession to frame these notices in a different form from that which had been "expressly ruled" sufficient by this court years before. We must follow the decision and not the advice.

This is a matter concerning the sufficiency and legality of a system of practice under a statute, which system has been pronounced sufficient. It has been acquiesced in by the legislature, with whom is the power to correct it, for twenty-five years, and we feel constrained to follow that decision. At the same time we admit that the practice of giving more full notice as to time, parties and date at which the time commences to run, and is to end, is commendable.

The other question stated is, was there a claim within the meaning of the statute against the estate of the one co-surety before payment by the other co-surety.

The relation between co-sureties cannot be called a debt, demand or claim as between them. Of two sureties, A. and B., one has as much a claim against the other as the other has against the one. As to the matter of a debt, demand or claim between them, none exists. The rights of co-sureties

against the principal are the same, and, as against each other, are the same. As between the sureties, it is a mere relation, out of which a claim, debt or demand may arise through the happening of circumstances, and, if the circumstances are of one character, one surety is liable to the other, and, if of another character, then the other is liable to the one. As between the sureties, before payment by one, there is neither legal nor equitable claim or demand within the meaning of this statute. The whole doctrine of contribution after payment is based upon the general equity of equality of burden and benefit. Until there is burden or benefit, there is no claim, legal or equitable. It is said that one of the sureties can pay the debt, and thus have a claim, and that this is the duty of the co-surety. There is nothing in the statute, or in the general principles of law or equity applicable to the contract, which makes payment the duty of one more than it is the duty of the other; and the question is not whether one *can have* a claim *by payment*, for that is admitted, but whether there is a claim, legal or equitable, *before and without payment*.

This is the rule in Missouri, (8 Mo. 169; 9 Mo. 225; 23 Mo. 174,) where we can see no essential difference in the statute of that State and ours.

It is the rule in Alabama, (6 Ala. 716; 6 Port. 43; 5 Ala. 610; 9 Ala. 257; 10 Ala. 26; 8 Ala. 580,) where, although there is a difference in the statutes, still, the reasoning and general views of the court would condemn any other conclusion under our statute.

It is well settled that the ordinary statute of limitations, as between co-sureties, does not begin to run until payment of the debt by the co-surety; and the statute of non-claim in this matter should, I think, receive a like construction. 8 Pick. 103; 3 Fla. 105; 13 Fla. 416.

After the fullest examination and consideration of the question, our conclusion is, that a claim, which is due either presently or in future, must be presented, but where even a

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claim does not arise except upon the happening of a contingency, and that contingency is in doubt and uncertainty, then there is no claim, debt or demand within the meaning of this statute; and that, as between co-sureties before payment by one, nothing exists except a *mere relation*, out of which a claim may arise in favor of one against the other. Upon this ground the judgment should be reversed.

Judgment reversed.

H. F. FINLAYSON, APPELLANT, vs. JOHN B. LIPSCOMB,
RESPONDENT.

A supplemental bill, in the nature of a bill of review, and not a petition for rehearing, is the proceeding by which a defendant after final decree pronounced, but not entered or recorded, may have a rehearing of the original cause, and a hearing of new matter or facts discovered since publication. The office of a petition for rehearing under the statute considered and defined.

Appeal from the Circuit Court for Madison county.

This is an appeal from an interlocutory order granting a rehearing after final decree upon petition praying leave to bring forward additional evidence and for a hearing thereon. The order for such rehearing was granted by the Judge of the Third Judicial Circuit. The decision of the Supreme Court is confined strictly to a question of practice, without any reference to the particular facts in the case. The petition prayed leave to examine additional witnesses to establish certain facts alleged to be within their knowledge.

Patterson & Pope for Appellant.

S. Pasco for Respondent.

WESTCOTT, J., delivered the opinion of the court.

In this case, after final decree against defendant, signed and pronounced, but not entered, he files a petition praying a rehearing, and that "the case may be recommitted to the master, with leave to introduce other testimony in said cause by both sides." After notice and hearing the rehearing is granted upon condition that defendant pay all the costs, and will speed the cause. From this order the plaintiff appeals. This was a petition for rehearing under the statute. Sec. 2, Thomp. Dig. 462.

It is not conformable to chancery practice, nor does the statute authorize the court, under such petition, to grant leave to introduce testimony, of the character here sought to be made available, after final decree "pronounced" but not entered upon the minutes. The general rule is, that if the final decree has not been signed *and enrolled*; or, if, as is the case here, it has been signed and pronounced, but not recorded and entered, (as required by rules 3 and 87 of equity practice,) and it is sought to be reheard upon error apparent on the face of the proceedings, (not being a clerical mistake or error arising from any accidental slip or omission, rule 87,) or upon such facts, not appearing upon the face of the proceedings, as may be proven upon a rehearing, (such as evidence duly taken in chief and omitted to be read, or evidence constituting new matter relating only to papers since found, and which may be proved *viva voce* at the hearing, or to testimony going to show the incompetency of a witness in a former deposition; 6 John. Chy. 255; 6 Paige, 233; 1 Ves. Jr. 405,) then the petition for rehearing, authorized by the statute, is available for this purpose. If, however, a final decree signed and pronounced, but not recorded and entered, is sought to be reheard on new facts, or facts discovered since publication passed, the remedy is by a supplemental bill, in the nature of a bill of review. 2 John. Chy. 489; 3 Vmt. 148; 2 Harr. & John.

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230; 4 J. J. Mar. 500; 26 Maine, 11, 13, 14; 1 Story C. C. 218; 16 Ves. 350; 3 Atk. 809; Story's Eq. Pldg. §§ 422, 425; 3 Paige, 204; 8 B. Mon. 340; 3 Wis. 466; 2 Mrid. Chy. 303, 289; 1 Head, 460.

Upon petition for rehearing, after final decree, it is not proper to permit either party to enter into evidence requiring new depositions of the character here sought to be made available. Daniel Chy. Prac., 3 Ed., 1565.

The supplemental bill, in the nature of a bill of review to bring forward new matter, cannot be filed without leave of the court. This leave should be applied for by petition, which should pray a rehearing of the original cause at the same time that it is heard upon the supplemental bill. Story's Eq. Pldg. § 425. We do not propose to announce in this opinion what the defendant should show in order to entitle him to leave to file such supplemental bill. That question has not been considered by the Circuit Court.

In the case of Owens vs. Forbes, 9 Fla. 355, this court remarked that a bill in the nature of a bill of review is not of use in this State, as all decrees are enrolled when entered upon the minutes of the court. The general proposition that a bill in the nature of a bill of review is not of use in this State, we think cannot be sustained. We think such a bill is applicable to the case of a final decree pronounced, but not entered or recorded, for the very reason that it is *not enrolled* until entered, and to such final decree not enrolled, all the authorities concur in the conclusion that a supplemental bill in the nature of a bill of review is applicable. In addition to this we are unable to see that this question was raised in that case, or that it was involved in its decision. That was the case of an interlocutory decree, not a final decree, and the case of Baker *et ux.* vs. Whiting, 1 Story, 231, which was followed in Owens vs. Forbes, was expressly in point to the effect that a supplemental bill was in such case the proper remedy, and made a distinction between the case of a final and interlocutory decree. We re-

gard that case as authority for the proposition that a supplemental bill is the remedy applicable to such case, where an interlocutory decree, whether entered or recorded, or not, is sought to be reheard upon new matter. Further than this it cannot control us, as anything else therein contained is mere *obiter*.

The case of Putnam vs. Lewis and wife, 1 Fla. 474, which has been alluded to, we regard as authority for the proposition that a bill of review lies only after final decree, and is not applicable to an interlocutory decree. That was the only question before the court, and the case was remitted with permission to apply for proceedings other than a bill of review, which had been erroneously adopted as the method by which to reverse an interlocutory decree upon new matter discovered.

The action of the Circuit Court in the case now before us, was based upon the idea that this new evidence might be brought in upon petition for rehearing under the statute. This was error.

The order granting a rehearing should be reversed, without prejudice to an application, if deemed advisable by the parties, for other appropriate proceedings. (1 Fla. 476.) As to the propriety of granting such application as may be made, this court expresses no opinion.

The order is reversed without prejudice to an application by defendant for other appropriate proceedings.

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SAMUEL PASCO, APPELLANT, vs. ROBERT H. GAMBLE AND
WILLIAM G. POOLE, RESPONDENTS.

1. The statutes of this State provide that the mortgagor shall be entitled to the possession of the mortgaged property until after decree of foreclosure and sale; that the mortgage is a "specific lien" upon property, and that the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding and outbidding all competitors in market. An execution purchaser of the equity of redemption takes the land subject to the equitable rights of the mortgagee against the mortgagor. The possession which the law allows the mortgagor, as well as such purchaser, is subordinate to the equitable rights of the mortgagee. The right to possession exists *cum onere*. Non-residence and insolvency of the mortgagor, a failure on the part of the execution purchaser in possession as well as of the mortgagor to keep down the interest of the mortgage debt, and clear inadequacy of the mortgaged premises to pay the debt, are equities by which the court can affect the conscience of the party thus in possession. The mortgage is in equity a charge upon the lands and its produce, and under these circumstances, a receiver of the rents and profits should be appointed upon bill seeking foreclosure and sale.
2. Where the bill fails to set forth these equities, and neglects to pray for a receiver or for any sequestration of the rents and profits, it is not conformable to chancery practice to appoint a receiver upon petition without amendment of the bill. A petition in such case cannot be attended to in the matter of appointing a receiver as setting up substantial equities not otherwise alleged or claimed in the pleadings. The plaintiffs must amend their bill to make these equities available.

Appeal from Circuit Court of Jefferson.

A statement of the case appears in the opinion of the court.

S. Pasco for Appellant.

G. P. Raney for Respondents.

WESTCOTT, J., delivered the opinion of the court.

This bill is filed by trustees, Robert H. Gamble and William G. Poole, mortgagees, against the mortgagor, James E. Anderson, and Samuel Pasco, an execution purchaser of

the equity of redemption in a tract of land in Jefferson county. The sale under the execution was had subsequent to default in payment of the mortgage debt. The bill prayed a simple foreclosure and sale. After appearance and default, there was a decree *pro confesso* against the mortgagor. The execution purchaser answered that one of the mortgagees, William G. Poole, was in possession of the land during the years 1870, 1871, 1872 and 1873; that from several interviews with him he derived the impression that the mortgage debt was paid from the rents and profits of the land, and prayed that an account thereof might be taken and applied to the mortgage debt. The court, after notice to the purchaser and his tenants for the year 1875, appointed a receiver of the rents, directing the tenants to attorn to him, such order to become effective in the event the execution purchaser failed to give bond to account therefor. This order is made upon petition by the mortgagees setting up insolvency, that the land was entirely inadequate as security for the debt, and a failure upon the part of the execution purchaser to pay the taxes for the year 1874. The petition also alleged that the mortgagor, before the purchase under the execution, had removed beyond the State, and that the whole amount of the principal and interest of the debt was due. From this order the execution purchaser takes an appeal, and the general question presented for our determination is, whether, under the circumstances stated, a receiver of the rents and profits of the mortgaged property can be had in this State.

The rents and profits, of which a receiver was here appointed at the suit of the mortgagee, are rents due the execution purchaser of the equity of redemption under contracts with parties made subsequent to his entry under the sheriff's deed, which was after default in the payment of the mortgage debt or any part of the interest thereof. While such purchaser is permitted by the mortgagee to remain in possession, collecting the rents, he takes them without lia-

bility to account. In the matter of account he occupies the same relation to the mortgagee that the mortgagor in possession would; (6 Rich. 311; 10 Met. 112-15;) and the rule is, that a mortgagor in possession is not accountable to the mortgagee for profits resulting from his own use, or for rents received of tenants before and independent of any action by the mortgagee looking to the assertion of such claim, while a mortgagee in possession is always, in the absence of some special contract, accountable for such rents to the mortgagor. (1 Hilliard on Mort. 104, 134, 35, 45.) The mortgagee, by virtue of the simple existence of the mortgage, is not to have the rents under leases, either before or subsequent to the mortgage. Says Bayley, Justice, in case of a lease made after the mortgage: "The tenant may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents." (9 B. & C. 251; 11 Ad. & Ell. 307.) Here the rents became due after the institution of the foreclosure suit, and the receiver was appointed with instructions to collect the rents due and accrued before any payment to the purchaser was made. In such cases, upon an allegation of insolvency of the mortgagor and inadequacy of the property as security for the payment of the debt, the general practice in some of the States is to appoint a receiver in order that the rents due, and to become due, might be applied to the mortgage debt. In other States, because of the remedies which the mortgagee of the legal estate has in his own hands, equity will not appoint a receiver on his application. In this State, as in New York, the mortgagee is deprived of any remedy by which he can acquire possession; and unless our statute deprives a court of equity of its power to appoint such receiver at the suit of the mortgagee, we think the New York rule should prevail, and that a case is here made for a receiver according to that practice, and to the practice of the English courts in analogous cases.

Our statute, (Chap. 525, p. 104, acts of 1853,) provides

that a mortgagee is a specific lien upon property, and that the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding and outbidding all competitors in market.

It is clear from this statute that any right which the mortgagee had at law to possession of the mortgaged property, until after decree of foreclosure and a purchase at the sale, is destroyed; and the question is, whether the right of the mortgagee to the rents here claimed must not fail, both in law and equity, when his right to possession under the statute ceases to exist. The relation between mortgagor and mortgagee is essentially changed. A mortgagor entitled to possession by statute cannot be tenant at will to the mortgagee. Ejectment cannot lie against him, because he is entitled to possession. There is no action of trespass for mesne profits, because he is no trespasser. There is no action of assumpsit, for there is no promise, express or implied, to pay.

On the contrary, the implied agreement, as remarked by Chief Justice Parker, when speaking of a mortgagor rightfully in possession, is, "that the mortgagor shall take the rents and profits to his own use until he shall be lawfully dispossessed." In the State of New York, the action of ejectment by the mortgagee has been abolished. He has at law been denied all remedy to get possession, and Chancellor Kent remarks that the consequence is, that a "court of law would seem to have no jurisdiction over the mortgagee's interest. He is not entitled to the possession, nor to the rents and profits, and he is turned over entirely to the courts of equity." (4 Kent, 159; 15 Mass. 270; 1 Pick. 90; 9 Serg. & Rawle, 311.) Lord Hardwicke, in *Mead vs. Lord Orrery*, 3 Atk. 244, says, "as to the mortgagor, I do not know any instance, where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into the possession." In this State there is no legal

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remedy for the mortgagee to get into possession; the mortgagor is entitled to possession, and, as a consequence, to the rents and profits, without account at law. We are entirely satisfied with this conclusion, so far as the legal rights of the parties are concerned; but is it true that, because the legal title is in the mortgagor, and he has all the rights of ownership, subject to the equitable lien, that in no case can equity appoint a receiver of the rents and profits? The existence of the legal right of entry and possession upon the part of the mortgagee at common law, we have seen, gave him extensive legal rights as to rents and profits, which, by virtue of his legal title, he acquired by entry or notice. These, as was said by Chancellor Kent, are gone, but at the same time the mortgage is a lien by contract. It is an encumbrance, and we are still met with the question, will not a court of equity, for the security and protection of the mortgagee—the holder of this encumbrance—appoint a receiver of the rents and profits of the property upon which it exists, in such a case as is here made? Equity will not hesitate in behalf of such an encumbrance and lien to control one properly and legally in possession, when he is doing acts affecting disastrously the security. A mortgagee out of possession, and without a bill of foreclosure, may enjoin a mortgagor properly in possession from doing any act whereby the land would become less sufficient security for the debt. (3 Atk. 210, 237; 3 Ves. 105; 2 John. Chy. 147.)

I am clear that wherever the mortgagor, legally in possession, and entitled thereto by statute or contract, refuses and fails to do any act which is necessary to the preservation of the estate, and to the doing of this act the appointment of a receiver and sequestration of the rents is necessary, that a court of equity should not hesitate to take the possession from him. Here one of the allegations is that the purchaser has failed to pay the taxes. Such tax is an annual charge upon the lands, and when a receiver is necessary to its discharge the appointment is proper. (1

Malloy, 26, note; 1 Bland, 297; 3 Edw. Ch'y, 312; 1 Barb. Ch'y Prac. 665; 19 Wis. 163; Walk. Ch'y Repts. 43; 19 Iowa, 183; 35 Ga. 180; 5 Gill. and John. 314.)

At the outset of this investigation, controlled principally by the California decisions, our view was, that the statute, destroying all rights of possession to the mortgagee, destroyed also all his equitable rights and remedies by which a sequestration of the rents and profits of the land might be had. This view in California has been condemned in Nevada, where, notwithstanding the statute gives the right of possession to the mortgagor until foreclosure and sale, the court in such a case as this sanctions the appointment of a receiver. (1 Nevada, 184.)

We are now satisfied that his right to possession was not the basis of this equity. He had no right in equity to possession as against the mortgagor, unless there were equities affecting the conscience of the mortgagor, by which his possession could be controlled for the benefit of the charge and encumbrance, and equity gave her aid when these circumstances existed, and when at law the mortgagee could not get possession, or his right there was obstructed or not available. The equity results from the fact that a mortgage is a charge upon the land; that the land is inadequate security for the debt; that the mortgagor is insolvent or resides out of the State; that both the mortgagor and the purchaser at the execution sale have paid no attention to arrears of interest due upon the mortgage debt, or to pay taxes then due and unpaid. This rule we deduce from the uniform action of courts of equity in analogous cases, where, as against the legal right of possession, equity will sequester and apply the rents and profits to a charge or encumbrance. The right to appropriate the rents and profits which equity gives the mortgagee, where a receiver is appointed at his instance, does not result from any specific pledge of such rents contained in the mortgage. Equity makes the mortgage, as between mortgagor and mortgagee, a charge upon

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the rents and profits whenever the mortgagor is insolvent and the security is inadequate, and especially is it the duty of the purchaser in possession to keep down the interest. As is remarked by Coote, (on Mortgages, 342, cited with approbation by Chancellor Dargan, in *Matthews vs. Preston*, 6 Rich. Eq. 307, note,) "although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him while in possession to the receipt of the rents and profits without account, yet equity, regarding *the land with all its produce* as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee." This equitable charge exists upon the produce, notwithstanding the fact, (as Chancellor Dargan says), that in a court of equity the mortgagor is regarded as the owner of the land, even after forfeiture, and the mortgagee is considered only in the light of a creditor having a lien upon the land created by the mortgage. It is to be remarked that at the time of this decision by Chancellor Dargan, the provisions of the act of the Assembly of South Carolina, of 1791, were in force, and that under that act the mortgage was declared a mere security for the debt, the fee remaining in the mortgagor. (Rice's Eq. 373.)

After the appointment of a receiver, the rents and profits coming to his hands (as is said by Baldwin, J., 4 Grat. 208) are to be distributed according to the rights and priorities of the parties "in or to the principal subject, out of which these rents and profits issue." The effect of the statute in Wisconsin was thus announced in *Wood and Moon vs. Trask, et al.*, 7 Wis. 572: "Our statute has essentially changed the rule of the common law in relation to the position of the fee of the mortgaged premises after condition broken. The fee does not vest upon default of the mortgagor in the mortgagee. The fee only vests upon sale or foreclosure." That court, in *Finch vs. Houghton*, 19 Wis. 164, sustained an appointment of a receiver upon grounds such as are set

up in this case. In Michigan, (Walker's Chy. 44,) the early rule corresponded with the rule announced in New York, South Carolina, Wisconsin and Nevada. Under a subsequent statute taking away all right to a possessory action in the mortgagee, the rule in New York was condemned by the Michigan courts. (13 Mich. 23.) After the most thorough examinations I am capable of giving the subject, I think the weight of authority is in favor of the appointment.

The familiar case of a receiver, at the suit of a second mortgagee against the mortgagor in possession, where there are arrears of interest, (3 San. 109; 2 Russ. 151; 2 Kerr, 249; 1 Hog. 201; Kerr on Rec. 48; 6 Rich. 308; 4 Grat. 210,) shows that the legal right to possession is not a necessary ingredient for his appointment, for in such case the legal right is in the first mortgagee, and yet the second mortgagee can, as against the mortgagor, where there are such equities, as in this case, have a receiver of the rents and profits.

The English courts do not hesitate to appoint receivers against a mortgagor in possession, having the legal estate, at the suit of equitable mortgagees, where proper equities exist. 6 Hare, 620; 2 Russ. 150; 3 G. & C. 379; 2 Ridg. P. C. 58; Kerr on Rec'vrs. Chap. 2, Sec. 4.

The state of the security, the condition of the mortgagor, failure to keep down interest upon encumbrances, are strong equities leading to such action, and it has been said that "it is enough that a good equitable title be made to appear, and that the remedy at law should not fulfill the requisitions of justice." (13 Pri. 734; 22 Beav. 73; 26 Beav. 191; 2 J. & H. 76.) A receiver may, accordingly, in a proper case, be appointed to raise the arrears of an annuity. (13 Price, 734; L. B. Eq. 22.) So an equitable mortgagee may have a receiver appointed, if the payment of interest on his security be in arrears. So if a person takes a conveyance of a legal estate, subject to equitable interests, he must satisfy these equitable interests, or submit to the appointment of a

receiver. (1 Mer. 54.) So where tenants for a particular estate, for life or in tail, neglect to keep down the interest due upon encumbrances upon the estates, courts of equity will appoint a receiver to receive the rents and profits in order to keep down the interests, for this is but a mere act of justice to the encumbrancers. (Story, 11 Ed. § 838; Jeremy on Eq. Jur. B. 1 Ch. 7, § 1, pp. 251-2; 1 Schl. & Lefr. 407, note; 3 Mer. 560.) These cases are mentioned, not as precedents in *all respects* strictly applicable to the case of a mortgagor in possession under our statute, but to show that in most cases the legal right to possession exists *cum onere*, and that equity attaches to that possession certain duties, which, if not discharged, it will, when necessary to their discharge, through its receiver, sequester the rents and profits of an estate. Our conclusion is, that the mortgagor or purchaser of the equity of redemption under our statute has the right to possession, yet, that such possession is subordinate to the equitable rights of the mortgagee. That, in case of non-residence and insolvency of the mortgagor, a failure on the part of an execution purchaser in possession, as well as of the mortgagor, to keep down the interest of the mortgage debt, and clear inadequacy of the mortgaged premises to pay the debt; are equities by which the court "can affect the conscience of the party in possession under legal title." And, as the mortgage in equity, where the mortgagor is looked upon as the real owner, is a charge upon the land and its produce, the court, under these circumstances, should appoint a receiver in order to the sequestration and application of the rents and profits. The purchaser here in possession has his title subject to the equitable interests of the mortgagee, and he must satisfy them. 1 Mer. 54.

We see nothing improper in the frame of the order here made, and the only remaining question is, whether the appointment was properly made upon petition and notice after answer. The objection made is that the bill

does not make a case for a receiver, does not even pray for a receiver, and that the equities sought to be made operative by that end are set up by petition only. It is true, that the inadequacy of the security, the insolvency of the mortgagor, and the failure to pay the taxes, are not mentioned in the original bill. It is also true that the bill has no prayer for a receiver, or for the application of the rents and profits to the mortgage debt. That the mortgage debt is due, that no interest has been paid, and that the mortgagor is a non-resident, does, however, appear otherwise than by the petition. The rule applicable to this petition is, that, like a motion, it cannot be attended to as laying a foundation for equities not otherwise alleged or claimed in the pleadings. The bill, in this case, contained no prayer for a receiver, set up no equities as to the rents and profits, except the existence of the mortgage debt and the non-payment of the interest hereon; nor did it ask any relief as to the rents and profits.

When the petition was filed in this case, the cause stood upon bill and answer, the application not being in. Upon petition setting up these equities and asking leave to amend the bill, such amendments as were necessary to make them available should have been allowed in this case in conformity to Rule 42 of Practice in Suits in Equity. The amendment should not have been allowed, however, except upon a payment of costs, as it was the neglect of the plaintiffs which rendered it necessary, in order to the proper presentation of their case.

The order appointing the receiver in this cause is reversed without prejudice to an application to the chancellor to amend the bill as the plaintiffs may be advised, (such application to be considered as made after answer and before replication,) and to the appointment of a receiver upon the amended pleadings. In the meantime, all parties are enjoined from making any disposition of the rents and profits of the mortgaged land until the further order of the Circuit

Sedgwick v. Dawkins.

Court. The order is reversed, and the case remanded for further proceedings not inconsistent with this opinion and conformable to law.

WILLIAM SEDGWICK, APPELLANT, vs. DE WITT C. DAWKINS, APPELLEE.

An attorney of the Circuit Court is prohibited from being security in an appeal, and a violation of the rules will result in its dismissal.

Appeal from Duval Circuit Court. Motion to dismiss the appeal.

C. P. Cooper, for Appellee, submitted the following points on the motion to dismiss:

1. That the right of appeal is barred by the lapse of time.
2. There is no bill of exceptions filed in this case, as required by law and the rules and practice of this court.
3. There is no lawful bond or undertaking filed, apparent upon the record.
4. The costs of the court below have not been paid by the appellant.
5. After a verdict had been rendered for the defendant in the court below, and plaintiff's motion for a new trial had been denied, the plaintiff abandoned his said suit in the courts of this State, and brought a suit in the name of William Smith, a grantee in privity with the plaintiff, involving the same subject-matter, exclusively and alone against the appellee, in the Circuit Court for the Northern District of Florida, holden at Jacksonville, in said district, which resulted in a verdict and judgment in favor of defendant. The appellant is therefore estopped from prosecuting this appeal.

6. The appeal is not brought by the plaintiff in the court below, or by his authority, but is brought and prosecuted by his attorney in the court below, against the wish of the plaintiff.

WESTCOTT, J., delivered the opinion of the court.

There are several grounds upon which a dismissal of the appeal in this case is urged. We consider only one, which is, that the principal to the appeal bond here executed is the attorney of record of the appellant. Under the rules of the Circuit Court, an attorney of the court is prohibited from entering himself as security in an appeal on pain of being considered in contempt, and of having the proceeding dismissed on account thereof.

It has been the practice of this court to dismiss appeals upon this ground. This court, in *Love vs. Sheffelin & Co.*, 7 Fla. 43, remark that this rule is not prohibited by the Constitution of the State, has its foundation in right and propriety, and should be strictly observed and enforced; and such was the action in that case.

The execution of the bond by the attorney in this case is not alleged to have been done by him through mistake, nor is paragraph 2 of Sec. 271, Code, inconsistent with this rule.

That paragraph provides that, "when a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just."

Under this section, it is a matter of discretion with the court whether it will allow the amendment, and the court may regulate this discretion by its rules.

There is no reason urged or given by the appellant, nor does the court see any cause for relaxation of the rule here.

The appeal is dismissed.

Myerson v. The Home Insurance Co. of Columbus, Ohio.

S. MYERSON FOR USE OF G. FORCHEIMER, APPELLANT, VS.
THE HOME INSURANCE COMPANY OF COLUMBUS, OHIO,
APPELLEE.

Where there is no final judgment in a common law case, the appeal must be dismissed.

Appeal from the Circuit Court of Escambia county.

Motion to dismiss appeal upon the ground that the record shows no final judgment.

E. A. Perry for Appellant.

WESTCOTT, J., delivered the opinion of the court.

The appeal in this case is from an order of the court denying a motion for leave to file a copy of the contract, which was the cause of action, and to set aside an order of dismissal, entered in the cause by the clerk, upon the failure of the plaintiff to serve a copy of the cause of action upon the defendant two days before the rule day succeeding the filing of the declaration.

The appeal is restricted to the ruling of the court simply denying this motion. This action of the court is in no sense a final judgment. If the case was pending before this motion, it is still pending, notwithstanding its denial, and, if it was not, nothing preceding the action of the court upon this motion is brought up by this appeal.

The appeal is dismissed.

JOHN MILLER, PLAINTIFF IN ERROR, VS. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. By the statute of this State there is no limitation of the time within which a party convicted of a crime may have a writ of error; and such a writ may be had after the actual execution of the judgment or sentence.
2. The term of imprisonment to the State prison commences with the day on which sentence is pronounced.
3. The statute provides for the discharge on bail of a prisoner under sentence upon the order of the judge granting a stay of proceedings and the allowance of a writ of error.

Writ of error from the Circuit Court of Madison county.
Attorney-General Cocke moved to dismiss the writ of error.

The grounds of the motion appear in the opinion of the court.

RANDALL, C. J. delivered the opinion of the court.

The Attorney-General moves this court to dismiss the writ of error in this case upon the ground that the writ was not issued until after the prisoner, the plaintiff in error, was actually confined in the State prison, in execution of the sentence of the court. And the argument was, that the judgment or sentence being in process of execution, the defendant being actually confined in the State prison, it would avail him nothing if the judgment were reversed, there being no lawful means of relieving him from the confinement, and he could not, therefore, be present at a new trial. And in effect that the actual confinement in the State prison in execution of the sentence was an actual limitation of the time for procuring a writ of error. By the statute, there is no specific limitation of the time within which this writ must be obtained in criminal cases. Practically, if the sheriff should, as he may, deliver the prisoner to the warden of the State prison at the moment the sentence is pronounced by the court, the rule contended for would utterly deprive him

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of the benefit of the writ, and he would be subjected to all the ignominy and suffering incident to the conviction and confinement for an infamous offense, while the record and proceedings may show that he had not committed any offense whatever.

Should this court ascertain, upon a consideration of the case, that the prisoner was improperly convicted or improperly sentenced, we apprehend there would be no difficulty in the way of delivering him from further confinement in the State prison under such conviction; so that we do not think that there would be any practical obstacle, in that respect, to a new trial. And it has been held that the term of imprisonment under a sentence of the court, upon conviction, commences at the date of the sentence; (*ex parte Meyers*, 44 Mo.279;) and, unless a different day be appointed for the commencement of the term of imprisonment, we do not see how it can be otherwise. So that, if the rule should be as contended for, it would in nearly every case deprive the prisoner of the benefit of the writ, for error can only be brought to the final sentence or judgment.

The statute has expressly provided that, in cases of this kind, if the prisoner shall, at the time of applying for the writ, be in custody under sentence of conviction, the allowance of the writ of error shall not discharge such party from custody, except by order of the court or the justice allowing the writ and granting a stay of proceedings. Laws of 1848, Chap. 138, § 5.

This clearly recognizes the right of the prisoner to have the writ at any time during his imprisonment under sentence.

The motion to dismiss is denied.

JOHN MILLER, PLAINTIFF IN ERROR, VS. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. The act of 1870, entitled "An act concerning testimony," gives to the accused in all criminal prosecutions the right to make a statement, under oath, before the jury, of the matter of his or her defense, and does not make the accused a witness in the case, or subject him to the rules governing in the examination of witnesses.
2. Such statement, when so made, is for the jury alone, and to be taken by them into consideration in connection with all the evidence of the case, and to be allowed such weight, and such only, as they, in their judgment, may see fit to give to it.
3. It is not sufficient, in a case of perjury, for the court to charge the jury "that if they believed, from the testimony, that the accused took the oath, and that it was false, he was guilty." The court should charge that they must find that the accused took a wilfully false oath, and that it must be so taken in relation to matter material to the issue, in order to make him subject to the punishment provided for perjury.

Writ of error from the Circuit Court of Madison county.

E. J. Vann for Appellant.

1. The court below erred in refusing to grant to the accused "the right of making a statement of the matter of his defense, under oath, before the jury," unless he was put upon the stand as a witness, subject to be cross-examined, &c., as a witness. Laws of Fla. 1866, Chap. 1473, No. 10, Sec. 4.

Intention of the law-maker may be gathered from the context. In the first three sections of said act, parties to civil actions who are allowed to testify are mentioned and described as witnesses. This qualification is not used in section 4, and the idea conveyed by it is, by a proper construction of said section, they are excluded.

This view is not in conflict with 13 Fla. 680—*Barber vs. State*.

The discretion given to the court below to permit the party accused to make said "statement" was repealed by

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act in 1870, and the "right" to make it guaranteed without qualification. Laws 1870, Chap. 1846, No. 2.

The reason and policy of the law forbids:

1. Because the accused could not be made amenable as a witness—for instance, for contempt for not answering, &c., impracticable, &c.

2. Because by an expert cross-examination the accused might be entrapped into a confession, the fear of which, or a refusal to answer, might render this "right" a practical nullity.

3. Because intended as an *ex parte* "statement" of such as, and as much as, he may wish to "state" as "the matter of his defense."

4. Because no detriment to the State can result, as it is the exclusive right and province of the jury to believe the "statement" in whole, or in part, or not, as they may see proper.

II. The court erred in refusing, after the accused was sworn as a witness, under the ruling of the court, to allow him to testify to the matter or facts as made known, offered and proposed (in substance) to the court.

Because said testimony or "statement" was relevant, pertinent and proper, in that it showed, or intended to show, the *intent*, to-wit: that the oath alleged to be false was not willfully, knowingly and corruptly false, the *intent* being the gist of the offense, and as the "prisoner must be judged as though the facts were as honestly believed to be true." 1 Bish. Cr. Law, §§ 287, 288; 2 Ib. 1006-7-8; 2 Bish. Cr. Pro. §§ 841 to 850.

As to ignorance of law, of fact, and both of law and fact, *vide* 1 Bish. Cr. Law, §§ 294 to 312, 320 and 345.

III. The court erred in charging the jury that if they believed from the evidence that the accused took the oath, and that it was false, the prisoner "is guilty." Because the court should have charged that, if they believed from the evidence that the accused took the oath, and that it was

knowingly, willfully and corruptly false, they might find him guilty. 2 Bish. Cr. Law, 1006-7-8; 2 Bish. Cr. Pro. 341 to 380; Statute in regard to and definition of perjury, Bush. Dig. p. —; 3 McLean, 583; 4 Ib. 113; 3 Ala. 602; and *supra* as to intent.

IV. The court erred in charging the jury that they should not consider anything the prisoner said. 13 Fla. 680.

V. The court erred in charging the jury that ignorance was no excuse, and if the accused wished to avail himself of such a defense, he should have plead "insanity or idiocy," and that they could not consider it without committing perjury. 1 Bish. Cr. Law, 394 to 412.

VI. The court erred in charging the jury as follows: "You have nothing to do with the excuse on account of ignorance—that is a matter for the court—he should have plead it, &c. Authorities cited *supra*."

VII. The court erred in charging the jury that the accused "understood what the court asked him—was he any relation to Jerry Grimes." The court cannot express an opinion as to the conclusiveness, or *vice versa*, of the testimony—that is for the jury alone. Fla. Reports and Laws, *passim*.

VIII. The court erred in refusing to grant the accused a new trial. *Vide* charge of the court; exceptions taken at trial; motion for a new trial; and authorities cited above.

Mr. Attorney-General W. A. Cocke for the State.

1. Moved to strike from the docket, because the writ of error and supersedeas were obtained after the criminal was confined in the penitentiary. The writ of error and supersedeas could not reach the warden of the penitentiary—

1. Because not addressed to him.

2. Because the bonds could not be given on which the writ of error and supersedeas were granted. *Vide* act of Legislature in relation to writs of error and supersedeas. Bush, LVII. p. 278; Bouv. title, error; writ of error ad-

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dressed to the court. See Bouv. title, supersedeas. Wharton's Criminal Law, 3049.

Bill of Exceptions.

Grounds taken on the bill of exceptions, insufficient.

1. That the accused should be placed on the stand as a witness. If he made his statement, why should he not be cross-examined? The law does not forbid it. See statute, Jan. 16, 1866.

2. The second exception—no grounds for setting aside the verdict of the jury.

Perjury is defined by our statute; this is a statutory offense, not one at common law. See Perjury at Common Law; Wharton's American Criminal Law, Vol. 3, §§ 2198 and 2,199.

There is a difference in the statutory offense of perjury. *Vide* act of 1868, Laws of Florida, Chap. 6, p. 89, Sec. 2.

It is not, as contended in the bill of exceptions, necessary that the court should have instructed the jury that the oath was "knowingly, wilfully and corruptly false." That was not even required by the common law.

The indictment charges the accused with "wilfully" committing perjury. This is the only term used in the statute. This is sufficient evidence in the English and American practice. See Bouv. Law Dic. title, perjury, and the large number of cases cited.

The third ground of exception is, that the accused was ignorant that he was committing *perjury*. This is no excuse. *Vide* Wharton's American Criminal Law, 6 Ed. § 2,201, and cases cited on same page, notes k. n. o.

The court had the right to refuse to permit the statement to go to the jury after it was made. The discretionary power had not departed from the court to refuse the statement of the witness even after it had been made. *Vide* Barber vs. the State of Florida, XIII Fla., Opinion of the Court, p. 680, citing the act of January 16, 1866, (not of 1865, as mentioned in the opinion.)

The law in Bush is incorrectly copied; a part is left out.

It is also a mistake of Mr. Bush in stating that the act is repealed. Act of January 16, 1866.

Statement of the Case.

On November 24, 1875, John Miller, the plaintiff in error, was duly arraigned and tried in the Circuit Court of the 3d Judicial District, held in and for Madison county, on an indictment for perjury.

The indictment charged that on the 20th day of October, 1874, at a Circuit Court held at the court-house in the county of Madison, one Jerry Grimes was being tried upon an indictment for feloniously procuring a felony to be committed by one Isaiah Phillips, charged with the crime of forgery. That this John Miller was called and appeared as a juror; that he was challenged and sworn by the Judge touching his qualifications as such juror. That it became a material question and subject of inquiry whether the said John Miller was related to the accused, Jerry Grimes. That the said John Miller, intending to deceive the said court, unlawfully, falsely, knowingly, willfully and corruptly, did swear that he was not related to the said Jerry Grimes, when, in fact, at that time, he was the father-in-law of the said Jerry Grimes. That he so swore for the purpose of causing the said Jerry Grimes to be wrongfully acquitted on the said indictment, and for no other purpose whatever. That said John Miller knowingly, willfully and corruptly did commit willful and corrupt perjury.

On the trial of the cause, the counsel for the accused took certain exceptions to the rulings of the court, which, having been duly settled and signed by the Circuit Judge, appear in the return to the writ of error in the following words:

I. On the trial of the case, after the State had rested the defendant, the party accused, claimed and insisted upon the right of making a statement to the jury, under oath, of the matter of his defense. Whereupon, the court refused to

allow him to do so, unless he was put up as a witness, subject to cross-examination.

To which ruling of the court the said accused excepted.

II. The court, among other things, charged the jury that if they believed from the testimony that the accused took the oath, and that it was false, the accused was guilty.

To which the accused excepted on the ground that the court should have charged that, if the accused took the oath, and it was knowingly, willfully and corruptly false, they might find a verdict of guilty.

III. The accused offered to make a statement of the matter of his defense, on oath, before the jury, which defense was (in substance) as stated to the court: "That it was true that Jerry Grimes married the daughter of the accused, but that soon after their marriage said Grimes ill-treated his daughter and abandoned her. That he had for several years been compelled to support his daughter and child. That Jerry Grimes had gone off, and he did not consider he was anything to him or his family. That when the accused was asked on his *voir dire* whether or not he was related to the prisoner at the bar, Jerry Grimes, he answered he was not, being at the time of the taking the said oath under the *bona fide* impression and conviction that, as he, the said Jerry Grimes, had left his wife, &c., as aforesaid, he really was not related to the accused, Jerry Grimes. That he made oath to what he ignorantly supposed to be true, and thus that he did not willfully and corruptly make said oath."

The court refused to allow the accused to make such a defense, either as a statement or otherwise, on the ground, as the court said, of its irrelevancy, and that if the same was true it would be no defense, as ignorance of law was no excuse.

To which the accused excepted.

The jury found the prisoner guilty of perjury. The counsel for the accused moved for a new trial upon the errors so alleged, and also upon the further grounds that the

verdict of the jury was contrary to law, and because the jury was misled by the charge of the court.

The motion for new trial was denied, and the court proceeded to sentence the prisoner to State prison for the term of ten years.

The accused brings the cause into this court by writ of error.

VAN VALKENBURGH, J., delivered the opinion of the court.

On the trial of this case, and after the State had rested, the counsel for the accused offered the statement of the prisoner, under oath, as to the matter of his defense, which the court refused to allow, unless he was put upon the stand as a witness, subject to cross-examination.

The statute of 1865, Chapter 1472, Section 4, provides that "in all criminal prosecutions, the party accused shall have the right of making a statement of the matters of his or her defense, under oath, before the jury, when, in the opinion of the court, the ends of justice shall so require."

Under this act, it was in the discretion of the court to permit the accused to make such a statement, depending entirely upon the question as to whether the "ends of justice shall so require."

The making of such a statement under oath does not necessarily constitute the accused a witness, nor does it subject him to the rules applicable to witnesses, making him liable to cross-examination. It is simply a presentation verbally, in his own language and manner, of the matters pertaining to his defence, of such facts and circumstances surrounding the case as will go to excuse the offense and negative the idea of willful or corrupt intent. It is for the jury alone, and is to be taken into consideration by them, in connection with all of the evidence in the case, and to be allowed such weight, and such only, as they, in their judgment, may see fit to give it.

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In the case of Barber vs. the State, (13 Fla. 681,) where the error alleged was, that "the court charged the jury that the statement of the defendant is not evidence, and that they could not take such statement into consideration as evidence," the court says: "There was some purpose to be subserved more than the mere amusement of the jury in allowing the statement to be made. It is the jury alone who are entitled to consider the statement, and if it be remarked upon at all, it should be to suggest to the jury, in effect, that they are to attach to it such importance, in view of the nature of the offense charged, and of the testimony before them, as in their good judgment it is entitled to. It is for their consideration alone, and they may disregard it entirely," And again: "The defendant is entitled, when permitted to make the statement, to the benefit or disadvantage of such impression as he may be able to make upon the judgment of the jury."

This statute, however, of 1865, was repealed by Chapter 1816 of the laws of 1870. This is an act entitled "An act concerning testimony," embodied in a single section, and reads as follows: "In the courts of Florida, there shall be no exclusion of any witness in a civil action because he is a party to or interested in the issue tried. In all the criminal prosecutions, the party accused shall have the right of making a statement to the jury, under oath, of the matter of his or her defense."

This takes from the court the discretion allowed by the statute of 1865, and the unqualified right of the accused to make such a statement, under oath, to the jury, is established by law.

Had it been the intention of the Legislature to provide that the accused should make himself a witness, subject to the rules controlling in the examination of witnesses, there would have been no necessity for the second paragraph in the section where this provision is found. A slight change of the first portion of the section would have covered every case of civil action or criminal prosecution.

The second ground of error is: "The court, among other things, charged the jury that if they believed, from the testimony, that the accused took the oath, and that it was false, the accused was guilty."

Perjury is defined in the elementary books to be the taking of a willfully false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely, in a matter material to the point in question, whether he be believed or not. Our statute, in accordance with this definition of perjury, in an "act to provide for the punishment of crime and proceedings in criminal cases," passed in 1868, says: "Whoever, being authorized or required by law to take an oath or affirmation, *willfully* swears or affirms, falsely, in regard to any *material matter* or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury," &c.

It will be seen that both at common law and by statute in this State, the rule is the same, or, in other words, that the common law definition of the crime of perjury is made a portion of the statutes, and that the oath must not only be false, but that it must be *willfully* false, and to *matter material* to the issue. It is necessary so to charge the offense in the indictment, or there is no crime alleged. An oath may be false, and still not willfully false, so as to constitute the crime of perjury. 2 Bishop Crim. Law, § 1046. See, also, Commonwealth vs. Brady, 5 Gray, 78.

It may also be to an immaterial matter or thing, one not material to the issue, in which case it could not be held as a willful false oath. 1 Hawkins P. C., C. 27, page 431.

In some cases, where a false oath has been taken, the party was punished by indictment at common law for a misdemeanor, though the offense did not amount to perjury. 2 Russell on Crimes, 603; 2 Bishop C. L., § 1014.

It is said "the false oath must be willful and taken with some degree of deliberation; for if, upon the whole circum-

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stances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable." 1 Hawkins, P. C., C. 27, § 2; 2 Russell on Crimes, 597.

A false oath, taken by inadvertence or mistake, cannot amount to voluntary and corrupt perjury. 2 Wharton C. L. § 2199.

On the other hand, it has been held that a man may be guilty of perjury if he swears to a particular fact without, at the time, knowing whether it be true or false. It is no defense that the oath so taken is true, if the party swears to it willfully and corruptly, and has no probable ground for the oath. 1 Hawkins P. C., C. 27, page 433; People vs. McKenney, 3 Parker C. R. 510.

It will thus be seen that there is a difference between a *willful* false oath, constituting the crime of perjury, and a false oath which, at common law, might be punished as a misdemeanor. The one is stubborn and corrupt, while the other is simply not true, lacking the elements which go to constitute the crime of perjury as defined by our statute. The jury must find that the accused was guilty of taking a willfully false oath, and in relation to matter material to the issue, in order to convict him of the crime of perjury and to render him liable to the punishment prescribed for that offense, and to this end the court should have so charged them.

The third ground of error assigned is similar to and embraced in the first, that the court refused to permit the accused to make his statement of the matter of his defense, on oath, before the jury. The accused, at the same time of making such offer, stated to the court the substance of the statement so proposed to be made. The court refused to

grant the request upon the ground of irrelevancy, and said that if the facts so proposed to be stated to the jury were true, it was no defense. This point has been disposed of under the first above assignment of error, where we hold that the accused, under the statute, has a right to make a statement of the matter of his defense, on oath, before the jury. We cannot see how such a statement as is offered by the accused would be irrelevant. It related, certainly, to the matter of his defense; to the question, which the jury must determine, of the intent. Was the oath alleged to have been taken by the accused *willfully false*? or was it taken through inadvertence, and not with a corrupt motive? It would go for what it was worth, and while it might not strictly be a defense to the prosecution, yet the accused had a right to its consideration by the jury, whose judgment might have been influenced in his favor by it. "It would give to the jury for their consideration the facts upon which his oath was based, and the reasons operating upon his mind, and, from those facts and reasons they might determine the motives, if any, influencing him. We think it should have been admitted by the court.

The judgment must be reversed and a new trial awarded.

GEORGE S. WILSON AND JAMES G. WILSON, APPELLANTS,
VS. MONTGOMERY L. BROWARD, ADMINISTRATOR OF
ESTATE OF CHARLES BROWARD, DECEASED, APPELLEE.

The third section of "an act to provide for the payment *pro rata* of the debts of insolvent estates," approved January 8, 1853, does not expressly prohibit suit against the executor or administrator of an insolvent estate, upon "unauthenticated or admitted claims," and such claims may be established by suit, the judgment thereon to be enforced or collected in the manner provided in that act for the collection of other claims against the estate.

Wilson and Wilson v. Broward.

This action was in assumpsit upon certain orders, notes, and other evidences of indebtedness of the said Charles Broward, in his life-time, given to the plaintiffs, and to the persons from whom the said plaintiffs acquired title. It was brought in the month of June, 1875, against Montgomery L. Broward, the administrator of the estate of the said Charles Broward, deceased. The appearance of the defendant was entered, and at the rule day in August his plea was filed as follows: "The defendant, by A. Doggett, his attorney, says that the said estate whereof he is administrator is insolvent, and that as administrator he has filed a written suggestion of such insolvency, in the office of the Judge of the County Court, for the county of Duval, pursuant to the statute of the State of Florida in such case made and provided."

To this plea the plaintiffs, by their attorney, H. Bisbee, Jr., filed a general demurrer.

On the hearing of the case on 18th November, 1875, the court overruled the demurrer, dismissed the cause, and gave judgment for defendant. From this judgment plaintiffs appeal.

H. Bisbee for Appellants.

No counsel for Appellee.

VAN VALKENBURGH, J., delivered the opinion of the court.

The only question presented for consideration by the record in this case is, can a party prosecute to judgment an "unauthenticated or admitted claim" against an intestate's estate, after a suggestion of the insolvency of such estate has been filed by the administrator, in pursuance of the statute approved January 8, 1853.

The rule is well settled with respect to personal claims founded upon any contract, covenant or debt, that the right of action, upon which a testator or intestate might have

been sued in his life-time, survives his death, and that the same can be enforced against his executor or administrator. In 1828, the Legislature of this State passed an act by which it was provided that "no executor or administrator shall be compelled to pay the debts of the testator or intestate until after the expiration of six months from the taking out letters testamentary or letters of administration; and, if any person shall bring any action against any executor or administrator within the aforesaid six months, the plaintiff, although he may obtain judgment for the amount of his demand, shall not recover any costs in his suit, nor have execution on his judgment until after the expiration of the said six months." (Thomp. Dig. 205.) The right of the party by this section to bring the action against the executor or administrator is in no way affected; it is as perfect as before the passage of the act, but if it is brought within the six months from the taking out the letters testamentary or of administration, no costs follow the judgment if in favor of the plaintiff, and the issue of the execution is stayed until the expiration of such six months.

In 1853, the Legislature passed an act entitled "an act to provide for the payment *pro rata* of the debts of insolvent estates," the third section of which reads as follows: "Be it further enacted, That in all cases where the claims against said estate are denied or contested by such executor or administrator, it may be lawful for such claimant to prosecute a suit at law, or in equity, for the establishment of the same as if this act had not been passed; *Provided*, That upon the rendition of a judgment or decree for said claims, the same shall be filed with the said Judge of Probate for *pro rata* payment, as other claims are required to be filed; but unauthenticated or admitted claims against said estate shall not be otherwise sued or enforced than as provided for in this act." Under this statute, approved January 8, 1853, the defendant pleads the insolvency of the estate of his intestate, and alleges that he has filed a written suggestion of

such insolvency in the office of the Judge of Probate of Duval county, that being the county in which letters of administration were granted.

The object of the Legislature in this enactment (as it appears not only from the enacting clause but also from the reading of the whole act itself) seems to have been to secure to the creditors of an insolvent estate a *pro rata* distribution thereof, and to prevent judgment or otherwise preferred creditors, through actions brought subsequent to the death of the intestate, from enforcing or receiving more than their *pro rata* share, and while it affirmatively authorizes the owners of "denied or contested" claims to "prosecute a suit at law or in equity for the establishment of the same," it nowhere, by direct negative terms or language, prohibits actions upon those which were not contested. The right of a party to prosecute his claim, when due, to judgment is secured by law, and to deprive him of this right the statute should be clear and in its meaning unmistakable.

The language of the proviso contained in the section of the statute above referred to must be construed to mean that unauthenticated or admitted claims against said estate may be sued and enforced in same manner as provided for those claims that are denied or contested. "That upon the rendition of a judgment or decree for said claims, the same shall be filed with said Judge of Probate for *pro rata* payment." The common law and statutory right of a party to prosecute his claim to judgment, whether the same was admitted or contested, was not intended to be changed by this act.

The judgment of the Circuit Court must be reversed.

MARY ANN KEECH, ALIAS MARY ANN NEWTON, APPELLANT, VS. STATE OF FLORIDA, APPELLEE.

1. The accused being indicted as accessory to the murder of Ellen Wells by William Newton, pleaded in abatement that the certificate of the Chairman of the Board of County Commissioners had not been recorded together with the list of persons selected by the board as required by law, from which juries are required to be drawn. *Held* that the omission of the Clerk to record the certificate did not constitute an irregularity in the drawing, summoning or empaneling of jurors.
2. Since the date of "an act to amend section 5, chapter 1628, Laws of Florida, reducing the number of grand and petit jurors," approved February 20, 1875, not more than fifteen persons should be summoned and sworn on a grand jury. The purpose of the act was to reduce the number of grand jurors, and its effect was to repeal so much of the existing law as required a greater number to be sworn.
3. A second or subsequent count in an indictment should contain a statement of all the necessary facts and allegations to charge the offense. A reference to a former count for the purpose of supplying a material statement is not sufficient.
4. The twenty-first section of the act of 1868, relating to jurors, provides that when a sufficient number of jurors duly drawn and summoned cannot be obtained, the court shall cause jurors to be summoned "from the bystanders or from the county at large." The court ordered a deficiency to be supplied "from the bystanders or from the county at large," thus making the order in the alternative form: *Held*, that the mode of supplying the deficiency in either or both ways is left to the discretion of the court, and there was no irregularity which could work an injury to the accused.
5. After the jury had been sworn, but before any testimony had been taken, one of the number was found to be an alien who had not taken any step toward naturalization, and was one of a class prohibited by the constitution from being a juror. The court discharged him and had his place supplied with a competent person. *Held*, not irregular. In such case the entire jury should be sworn anew.
6. A principal offender is, before judgment of conviction of felony, a competent witness against an accomplice or accessory in the same crime.
7. In "capital" cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life (Act of February 27, 1872, Ch. 1877.) It is held not to be error if the

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court omit to inform the jury of this law, unless specially requested to do so.

8. One charged as an accessory before the fact, in an indictment for felony, cannot, by law, be tried before the principal offender is tried, but both may be tried upon one indictment.
9. In an indictment for murder, the part of the body upon which the injury was inflicted should be stated. The dimensions of an incised wound should also be given.
10. In capital cases, before pronouncing sentence, the Judge should ask the prisoner whether he has anything to say why the sentence of the law should not be pronounced against him, and this should appear on record. But the omission of this ceremony is not ground for a new trial, but only for setting aside the judgment or sentence already pronounced, to the end that it may be properly observed and judgment regularly pronounced.

Error to the Circuit Court of St. John's county. Accessory before the fact to murder in the first degree.

A. A. Knight for Appellant.

First. The court erred in overruling the plea in abatement on file in the above entitled cause.

Second. The court erred in overruling the motion to quash on file in the above entitled case.

Third. The court erred in overruling the motion to quash the second count of the indictment, as spread upon the motion docket, under date of October 1, 1875.

Fourth. The venires for petit jurors returned and filed September 20, 1875, showed that but eleven of the twelve jurors summoned were returned by the sheriff, whereupon, the panel becoming exhausted upon the trial, the court directed jurors to be summoned from the bystanders or from the county at large to complete the panel, all of which was error upon the part of the court.

Fifth. After all the petit jury had been duly sworn, but before any evidence had been introduced, it appearing to the court that Ernest Frohn, one of the members of said petit jury, although a registered voter, was not a qualified elector, he court directed said juror, Frohn, to stand

aside; whereupon the panel was completed by taking a juror from the bystanders.

Sixth. The court erred in allowing William Newton, a witness for the prosecution, to be sworn, and allowing his testimony to go before the jury, upon the ground that the indictment in this case showed that said Newton was the principal in the felony under investigation, and the accused was the accessory.

Seventh. The court erred in allowing the said William Newton to be sworn, and in allowing said Newton's testimony to go to the jury, upon the following grounds: The said William Newton was, at the time he testified, under an indictment for a further and additional felony than the one for which the said defendant was being tried, to-wit: "Assault with intent to murder Henry Keech," marked Exhibit A, 2, and made part of his motion.

Eighth. The court also erred in admitting the testimony of William Newton, for the purpose of establishing another felony than the one with which the defendant stands charged, and also in admitting the testimony of Alonzo Hernandez, Dr. William Shine, and the testimony of other witnesses, to which exception was duly taken, to establish the same points, to-wit: the murder of Ellen Wells by said William Newton.

Ninth. The court erred in charging, as follows: "In considering the credibility of a witness, it should be considered with reference to his truthfulness or the reverse, and not to his character in other respects."

Tenth. The court erred in this, that it only submitted this case to the jury upon the definition of murder in the first degree, thus preventing the jury from considering the case in any other light than that the accused was guilty in that degree alone, or innocent of the charge.

Eleventh. The court erred in not charging the jury that the law allowed them to add to their verdict a recommendation of mercy.

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Twelfth. Judgment should be arrested and a new trial granted because the accused was indicted as an accessory before the fact and not for a substantive felony, and therefore the accused should have been tried with or after the conviction of the principal felon.

Thirteenth. The jury came into court with the following verdict: "We, the jury, find the prisoner, Mary Ann Keech, *alias* Mary Ann Newton, guilty of the charge, viz.: accessory before the fact to murder in the first degree.

FRANK GENOVAR, Foreman."

ST. AUGUSTINE, October 5, 1875.

Whereupon the court charged them as follows: "The verdict of the jury should be: we, the jury, find the prisoner guilty," or in case of acquittal: "we, the jury, find the defendant not guilty." "The name of the foreman should be signed to the verdict." All of which was error upon the part of the court, and duly excepted to by defendant's counsel. Whereupon the jury retired and brought in the following verdict: "we, the jury, find the prisoner guilty.

FRANK GENOVAR, Foreman."

ST. AUGUSTINE, October 6, 1875.

Motion overruled. Exception taken October 6, 1875. Appeal prayed in open court, said appeal to operate as a supersedeas. Thirty days allowed in which to perfect appeal.

R. B. ARCHIBALD, Judge.

Fourteenth. The court also erred in not giving the prisoner an opportunity to say why sentence of death should not be passed upon her, as appears from record.

A. A. Knight, for petitioner in error, cited in support of the assignment of errors the following authorities:

On first ground of error. Whar. Amer. Crim. Law, 3 Ed. §§ 945, 1041.

Second ground of error. 6 Med. 62; Cooley's Con. Lim. 141; Con. State of Fla. Art. IV, § 14; Bush's Dig. 5, § 14; Act of February 20, 1875, in relation to grand and petit

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jurors; Bish. on Statutory Crimes, § 154; 4 T. R. 2 and 4; Dwar. on Stat. 110, 111, and notes; 52 Barb. 533, 548; 12 Wheat. 270; 50 Penn. 150; 24 Ind. 194; ib. 155; 5 Beav. 582; ib. 154, note 4; ib. 156; 7 John. 497; 4 Cow. 556; 11 Wend. 329.

Third ground of error. Laws of Florida, act of August 18, 1868; Arch. Crim. P. & P. Vol. 1, 73; 1 Wash. C. C. 463; 4 Dall. 426; 2 Cush. C. C. 446; Bish. C. P. Vol. 1, § 381, note 3; 4 Carr. & P. 394; 7 Cal. 395, 398; Bish. C. P. Vol. 1, 1226.

Fourth ground of error. 13 Fla. 624.

Fifth ground of error. Hill. on New Trials, 16, § 6; ib. 130, § 15; 8 B. & C. 417; 12 Fla. 163; Amer. R. Vol. 15, 715.

Sixth ground of error. Greenleaf on Ev. Vol. 1, § 379.

Seventh ground of error. 9 Cow. 721; 2 Carr. & Payne, 411; 11 Fla. 252, 255.

Eighth ground of error. Bish. on Crim. Law, Vol. 1, 696; 29 Maine, 84.

Ninth ground of error. Greenleaf on Evidence, Vol. 1, § 416.

Tenth ground of error. 14 Fla. 522.

Eleventh ground of error. Bush's Dig. § 4, 273; Laws of Florida, Act of Feb. 27, 1872.

Twelfth ground of error. 13 Fla. 667; 39 Iowa, 118; 28 ib. 522; 7 Blachf. 20; Arch. C. P. 384; 13 Fla. 673-4; Wharton on Homicide, 2d Ed. §§ 177, 180; Wharton Amer. Crim. Law, 364-5, 369, 376; 11 Fla. 42.

Thirteenth ground of error. Bish. C. P. Vol. 1, § 1013; 8 Mich. 104; 14 La. An. R. 278, Amer. R. Vol. 11, 575.

Fourteenth ground of error. Arch. Cr. Pr. and Pl. Vol. 1, 676; 1 Chitty Cr. Law, 700; 2 Ala. 212; 11 Geo. 253; 3 Salk. 358; 3 Mod. 265; 4 Black. 376; 2 Hale's P. C. 401-7-8; 1 Chitty Cr. Law. 720.

Mr. Attorney-General W. A. Cocke for the State.

Points in the Bill of Exceptions.

1. Defendant moved to quash the venire of the grand and petit juries.

The court overruled the motion. The court did right. Act of Aug. 1, 1868, Sec. 5, page 17; Act of Feb. 20, 1875, Chap. 2043, page 55; Act of Feb. 20, 1875, Chap. 2046, No. 7, page 58; Constitution of the State, Article VI., Section 12.

2. There was a special plea in abatement. The State denied the allegations in the plea. They were not sustained, and the plea was overruled. Where the allegations of a plea are denied and not proven, the replication must be sustained.

The plea in abatement was properly overruled, because it does not present the proper legal defence. Wharton, Sections 536-537.

3. The defendant moved to quash the second count in the indictment on two grounds.

1. That the count shows that the court has no jurisdiction. The court had jurisdiction to try the defendant according to the indictment, as an *accessory before the fact*. Act of Aug. 6, 1868, Chap. 11, Sections 3-4-5, page 104.

2. That the second count is repugnant to the final count. This raises the question of jurisdiction, as to the right of the court over the person, and to try the prisoner for the offense charged, the party being in the State of Wisconsin at the time the murder was committed. Section 5 of Chapter 11 of Act, Criminal Laws of 1868, page 104; Wharton on the Conflict of Laws, Sections 875-876-878-879-881-921; Sedgwick on the Construction of Statutory and Constitutional Law, pages 64-65; Tyler vs. the State, 8 Michigan, 320; Commonwealth vs McLean and others, 101 Massachusetts, 1; Peoples vs. Adams, 3 Denio, 190.

4. That the venire of the petit jurors was exhausted be-

fore the panel was filled, and the court directed the jurors to be empaneled from the bystanders. *Vide* act relating to jurors, Aug. 1, 1868, Sections 21-22, and act in relation to jurors, &c., 1875, Chap. 2046, No. 7, page 58.

5. It then appeared that Ernest Frohn, one of the jurors, was disqualified, and the court ordered him to stand aside, and the panel was completed by taking a juror from the bystanders. This was in strict compliance with the statute of 1875, Chap. 2046, page 58.

6. Now, the case is before the jury; Newton offered as a witness; objected to because he was indicted as principal in the felony. Newton was indicted for a felony and was a competent witness. A conviction without judgment works no disability. Wharton's Amer. Crim. Law, Section 763; *ib.*, 783, 6 Ed.; Russell on Crimes, Vol. 2, Sec. 960, 8 Amer. Ed.; Greenleaf on Evidence, Vol. 1, Sec. 380; Best on Evidence, page 264, paragraph 170; *People vs. Whipple*, 9 Cowen, 707; *Peoples vs. Hevrick*, 13 John., 82; *Cushman vs. Loker*, 2 Mass., 108; *Skinner vs. Perot*, 1 Ashmead 57; *State vs. Valentine*, 7 Iredel, 225; *Dowley vs. State*, 4 Ind., 428; *The People vs. Castello*, 1 Denio, 83; *Keithler vs. the States*, 10 Smeed & Marshall, 192.

7. Newton objected to as a witness because he was under indictment for another felony. No weight can be attached to this objection.

See how conclusively the law of this State settles this question. Bush's Dig., LXIX, Sections 2-3, page 323.

8. Exceptions taken; that in considering the credibility of the witness, the court charged that the credibility of the witness should be considered with reference to his truthfulness, or the reverse, and not to his character in other respects.

The degree of credit given to the witness is a question for the jury. Greenleaf on the Law of Evidence, Vol. 1, Section 380; the *People vs. Costello*, 1 Denio, 83.

Instructions should be confined to the issue made by the pleadings. *Hooker vs. Johnson*, 21 Fla., 730; *Observations*

of Chief Baron Joy, top note to Greenleaf on Evidence, 1 Vol., Section 332, Redfield's Ed.

As to what is an accomplice. Bouvier's Law Dic., title, accomplice. See as to practice in admitting an accomplice as a witness; *ib.* All persons charged as *particeps criminis* are looked upon the light of accomplices. 1 Russell on Crimes, 21; 4 Blackstone's Com., 331; Best on Evidence, note 1, top page, 267.

Now we come to the motion for a new trial, which was overruled.

It will be observed by the court that up to the tenth specification in the motion for a new trial are the same points embraced in the bill of exceptions.

10. The tenth specification in the motion for a new trial was, that the court erred in this, that it submitted the case upon the definition of *murder in the first degree*, thus preventing the jury from considering the cause in other lights. *Vide* statute in relation to instructions of the court, Bush's Dig., LVII., Sec. 7.

11. The court erred in not charging the jury that the law allowed them to add to their verdict a recommendation of mercy. What law requires the court to make such a charge? *Vide* act of the Legislature, Bush's Dig., LVII., page 279, Sec. 7. This is all.

12. The twelfth specification for a new trial:

"Judgment should be arrested because the accused was not indicted for a substantive felony, but as an accessory before the fact, and that therefore the accused should have been tried with or after the conviction of the principal felon."

Not necessary to indict for a substantive felony. Act of 1868, Chap. 11, Sections 4-5.

See references previously made on trying a party as an accomplice.

13. The thirteenth specification for a new trial was an objection to the form of the verdict. Refer to the verdict. It is in strict accordance with the statute. *Vide* act.

The form of the verdict should be *guilty*.

Recommendation of mercy is at the discretion of the jury.

RANDALL, C. J., delivered the opinion of the court.

The plaintiff in error was indicted in October, 1875, in St. Johns county, as an accessory to the murder of one Ellen Wells, by William Newton, who was indicted for the murder as a principal.

I. The accused pleaded in abatement to the indictment that the certificate of the chairman of the County Commissioners was not recorded by the clerk, together with the list of persons selected as qualified to be jurors for the year 1875; and, further, that the said list contained the names of 301 persons instead of 300, and that said list shows that many names were erased therefrom, and others substituted in their stead. The evidence being produced to the court it was decided that the said plea was not sustained, and this is alleged as error.

In support of the first ground that the certificate of the chairman of the Board of County Commissioners was not recorded with the list of names, counsel refer to the third section of ch. 1628, Laws of 1868, which provides that the "list, certified and signed by the chairman of the Board, shall be forthwith delivered to the clerk, and by him recorded in the minutes."

It is not very clear that the law requires that anything be recorded except the list of names; the authority of the clerk for recording it being the certificate. The object of recording it is to preserve upon the records the list of names, and for the information and convenience of the court. It can scarcely be said that the omission of the clerk to record the certificate, or even the list, is an irregularity in respect to the selection, summoning or empaneling of jurors. If the clerk neglects to perform such duty as directed by the statute, the court may require and compel him to do it at any time, and thus the omission is cured. The accused cannot be



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prejudiced by it. If the list is, in fact, certified to the clerk, he is required to write the names on separate slips of paper, and deposit them in a box from which the juries are drawn, and it can make no difference to the accused that the list or certificate is not recorded until after the ballots are thus prepared or the jury drawn. As to the plea that there were 301 names instead of 300, it appeared that some names had been erased and others substituted before the list was brought to the clerk, and that 300 only remained; and it did not appear that any change had been made after the Board had completed the selection, and the presumption is that the erasures and interlineations were made by the Board, especially as it was not claimed that the list had been changed after it left their hands. As the evidence showed that the names remaining did not exceed 300, there was no error committed by the court in denying the plea.

II. The accused moved to quash the special venire for grand jurors upon the ground that the names of more than fifteen persons were drawn and summoned, and also moved to quash the indictment upon the ground that sixteen persons were sworn, and officiated as grand jurors in the finding of the same.

Section five of an act relating to jurors (ch. 1628 above cited) provided that the clerk, thirty days before the sitting of the court, should draw from the box the names of not less than eighteen, and not more than twenty-three persons, to serve as grand jurors. Section nine says "there shall not be more than twenty-three, nor less than sixteen persons sworn on any grand jury."

By "an act to amend section five of chapter 1628, Laws of Florida, reducing the number of grand and petit jurors," approved Feb. 20, 1875, the fifth section was amended by providing that the clerk should "draw from the box the names of not less than twelve, nor more than fifteen persons, to serve as grand jurors at said court." The Legislature,

however, omitted to expressly repeal or amend the ninth section.

In construing statutes which seem to conflict, the rule is well established that the later statute will prevail with reference to the subject matter of both, and if the two cannot stand together, the former will be deemed to be repealed by implication, in order to advance the remedy evidently intended to be accomplished by the Legislature; and in looking for the intent it has been sometimes necessary to observe the title to an act. This is peculiarly so under the present constitution, which, like many of the constitutions of the new States, and recent changes in some of the older, provides that an act of the Legislature "shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title." The title of the amending act under consideration evidently shows that the purpose of the Legislature was to "reduce the number of grand jurors," by providing that not more than fifteen should be drawn and summoned, instead of twenty-three as the law then stood. If section nine is permitted to stand, we have then a law providing for the drawing and summoning of fifteen, and then after the court convenes, a special venire must be issued to make up the deficiency. One of the safe-guards against abuse in the construction of juries is in the publicity, fairness and deliberation required by law, the responsibility for a proper selection being thrown upon public officers who are supposed to be responsible to the law and to the public. The selection and the drawing were to be public and to become of record, subject to the inspection of the public, in order, among other things, that any improper or irregular practice or conduct should be criticised and detected. The law, it is true, provides that the sheriff shall "return forthwith such farther number of grand jurors as may be required" to supply any deficiency, whenever those duly summoned failed to appear, or when those duly drawn could not be found. But it never

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was the policy of the Legislature to provide that a portion of the grand jury should be selected by the impartial mode of drawing by ballot, and another portion left to the selection of the sheriff upon his own judgment. Yet this would be the inevitable result if the ninth section were allowed to stand—a deficiency would *always* exist by positive enactment. It is not believed that the Legislature intended that there should be *always* a deficiency. In providing that “not more than fifteen persons” should be drawn to serve as grand jurors, it was not intended that if the fifteen were summoned and appeared, there would yet be a “deficiency,” because, if all who are allowed to be summoned are called and appear, no deficiency is contemplated, unless it appears to have been the policy of the Legislature to place the construction of the grand jury practically in the hands of a single person (the sheriff) by allowing him, in all cases, to select eight of them. This, instead of advancing the remedy, would advance the evil. We do not think that if the fifteen duly drawn are summoned and appear, there is any “deficiency” to be supplied, the deficiency contemplated under the law as it stood, having reference to the failure to summon some of those named in the venire, or the failure to appear of a sufficient number of those drawn and summoned in the manner provided to compose the jury. The title of the amending act is adopted by the Legislature itself in pursuance of its law making power, and as has been intimated it necessarily expresses, by force of the constitution, the intention of the enactment. That intent, so plainly expressed as in this instance, leaves nothing to inference. It was to reduce the number of jurors below the number required by the existing law, and it becomes meaningless and powerless if the ninth section can survive. As we believe it was contrary to the policy of the law as well as contrary to the express intention to allow it to stand, it must be held that any part of the former law which stands in the way of the reduction is necessarily repealed. Any

other conclusion would defeat altogether the plain import of the act last passed, and deprive it of any and all effect as to grand juries.

The special venire, therefore, calling for more than a number sufficient to make a grand jury of fifteen persons, and the indictment found by sixteen persons sworn as a grand jury, should be quashed. For the purposes of this case, it is, perhaps, not necessary to consider any of the remaining errors assigned, yet as they are important as questions of practice we will notice some of them.

III. The third error assigned is, that the court overruled the motion to quash the second count of the indictment.

The first count charges, first, that William Newton murdered Ellen Wells, and, second, that the accused Mary Ann Keech, *alias*, Mary Ann Newton, at, &c., in the State of Florida, was accessory thereto before the fact, and did counsel, hire and procure the said William Newton to commit the murder.

The second count omits to allege the fact of the murder by William Newton, in express words, but charges that Mary Ann Keech, on, &c., in the State of Wisconsin, did aid the said William Newton by hiring, &c., the commission of the murder of Newton "in manner and form aforesaid," referring to the allegation of the murder as stated in the first count.

The use of "counts" or different forms of charging the offense in one indictment is allowed in practice, but it is not proper in subsequent counts to omit any of the averments necessary to a complete statement of the offense. (Bishop's Criminal Procedure, §§ 182, 185; *State vs. Langley*, 10 Ind. 484.)

It is allowed, however, in a second count to refer to persons named in the first count, as "the said A. B.," "the said wife," &c., thus pointing to the same person named in the first. (Bish. Cr. Pros. § 187 and cases cited.) But the only safe rule is to state the offense and the names of persons and

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places in each count, in all cases where it is deemed necessary to employ more than one statement of the offense.

IV. The fourth error assigned is that the court directed the sheriff to summon "from the bystanders or from the county at large," a juror to complete the panel, there being a deficiency by reason that the "venire was exhausted before the panel was filled."

It does not appear by the record that a sufficient number to make a jury was not summoned, but that the venire was exhausted and a sufficient number had not been obtained. The point of the exception, then, is, that the Judge directed the selection to be made in the language of the statute, "from the bystanders or from the county at large," instead of a direction to summon the requisite juror from bystanders only, or from the county at large only. As the statute gives a discretion to the court in the matter we cannot discover that an error was committed in putting the order in the alternative form; and even if it were deemed an irregularity it is not one which we conceive could work an injury to the accused.

V. The fifth error alleged is, that after the jury had been empaneled and sworn, but before any evidence had been introduced, one of the jurors was discovered to be an alien, who had taken no step to become naturalized; whereupon he was discharged and another person summoned and sworn in his stead.

We must approve the action of the court. By the Constitution, Article IV., Section 23, an alien who had not taken the necessary oath in view of naturalization, is not a competent voter and is expressly *prohibited* from being a juror. In Tennessee a verdict was sustained where a minor was withdrawn from the jury after being selected, and before he was sworn, and another person substituted. (*Hines vs. the State*, 8 Humph., 597.) In Illinois it was held correct in a capital case to strike off a jurymen after he was sworn on the ground that he was an alien. (*Stone vs. State*, 2 Scam.

326.) See, also, *Com. vs. McFadden*, 11 Harris, Par. 12, where a person sworn on the jury was found incompetent from prejudice. (*Wharton's Amer. Crim. Law*, Sec. 590; *Bishop's Crim. Pro. Sec.* 808, citing *Tooele vs. Com.*; 11 Leigh, 714; *People vs. Damon*, 13 Wend., 351; *McGuire vs. State*, 37 Mississippi, 369.) The practice in such cases is, if the jury has been sworn, to discharge an incompetent juror, and, after filling his place, to swear the entire panel anew. The case of the *State vs. Madoil*, 12 Fla. R., arose before the adoption of our present Constitution. The objection to a person who is, by the express terms of the Constitution, prohibited from being a juror, taken by the defendant or by the State before the trial had been entered upon by the production of any testimony, is one which the court could not ignore without great impropriety. Nor do we understand that the court in the case of *Madoil* held otherwise.

In the present case the objection to the juror was not merely a ground of challenge which the party may waive by declining to challenge, but it goes to the very foundation of the right of trial by a jury of the country, a trial by one's peers, and the retention of the prohibited person upon the jury involved a violation of the Constitution of the State; and a new trial upon the verdict of a jury so constituted would be inevitable if, in a criminal prosecution, the accused was convicted.

VI. The second error assigned is, that the court allowed William Newton, a witness, to be sworn on the part of the State, while the indictment showed that Newton was the principal in the felony charged and the accused an accessory.

According to the English law, it was left to the judges in each particular case to determine whether accessories and accomplices should be allowed to testify. But an accomplice is not, as a question of law, disqualified, and even the principal is not disqualified as against an accomplice until con-

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victed and sentenced as a felon. (Roscoe's Cr. Ev., 153, *et seq.*; Wharton's Amer. Crim. Law, Sections 783-4.)

"It is not enough that a person may have committed an infamous crime, and that he may have confessed it. These facts may serve to destroy his credibility before a court and jury, and may render his testimony of little avail in the estimation of the latter, who are the exclusive judges of it; but the rules of law will not, on this account, authorize the court to exclude him from giving his testimony." *Sumter vs. the State*, 11 Fla., 247. And in several cases cited by the court, it was held that a conviction upon the testimony of an accomplice was legal, though the accomplice was uncorroborated.

An act of March 15, 1843, (Thomp. Dig. 335,) provides that "no person shall be deemed an incompetent witness by reason of having committed any crime unless he has been convicted thereof in this State," and it follows that it is not within the discretion of the court, in this State, to admit or to reject the witness, for he is, by express statute, a competent witness.

It was further objected to the competency of the witness, Newton, that he stood indicted for another felony, to-wit: an attempt to murder Henry Keech, and counsel cites authorities under English law in support of the objection. The statute, however, declares that he is a competent witness, notwithstanding he has been guilty of *any crime* until he has been "convicted thereof;" so that, until a judgment of conviction has been pronounced, he may be a witness, the jury being the proper tribunal to judge of the value of his testimony.

VII. The ninth ground of error relates to the charge of the court to the jury. The court charged as follows: "In considering the credibility of a witness, it should be considered with reference to his truthfulness or the reverse, and not to his character in other respects."

We do not discover from the record whether an attempt

was made to impeach any of the witnesses, or whether this portion of the charge may have been suggested by comments made by counsel upon the character of witnesses. As a general proposition, the rule, as given, is correct, according to the old books, though in some States inquiry is permitted into general character as a basis for an opinion as to whether the witness should be believed on oath. (Wharton, Section 814.) If this portion of the charge related to the witness, Newton, it is not sufficiently full and explicit, for the credibility of this witness depended not alone upon his general veracity, but upon his connection with this case, his relation to the parties, his position as an accused party, and his manner of giving his testimony, all which were necessarily before the jury, and his credibility, in view of all these surroundings, was to be judged of by the jury.

It is alleged for error that the judge gave the jury the definition of murder in the first degree only, thus precluding them from considering the principal offense as of a different degree. This is a mere hypothetical proposition of counsel. The charge of the court, as given in the record, does not sustain the assignment, and this court has always refused to consider questions not embraced in the record.

It is further alleged that the court erred in omitting to instruct the jury that "the law allowed them to add to their verdict a recommendation of mercy," in view of the statute of 1872, which provides that when such recommendation is made in cases of murder, the penalty shall be imprisonment for life instead of hanging.

We know of no rule requiring the court to instruct the jury in regard to the punishment to be inflicted upon criminals. It would be very proper for the court to instruct the jury as to the existence of this law, in all capital cases, and it would undoubtedly be the duty of the court to do so if it were specially requested. In this case we find no exception taken on account of the omission, nor any evidence that the court was so requested.

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VIII. The twelfth ground of error is that because the accused was indicted as an accessory before the fact, and not for a substantive felony, the accused should have been tried with, or after the conviction of, the principal felon.

We have already said that the second count of the indictment was not good. The first count charges the accused as an accessory, and it is expressly required by law that the accessory before the fact shall be tried either at the same time with the principal or after the conviction of the principal, unless the accused be indicted for a "substantive felony." (See Chapter XI, Section 4, Criminal Code of 1868.) The record fails to show that the principal had been tried at the time the accused was tried, and, therefore, the trial of Mrs. Keech, as an accessory, was premature.

IX. It is also insisted that the indictment was defective, in that it does not show upon what part of the body of the deceased the wound was inflicted. We believe it is uniformly held in the English books that the part of the body in which the deceased was wounded should be particularly stated. (2 Hawk. P. C., Ch., 23, § 80.) The English common law in relation to crimes and misdemeanors, except as to the mode and degree of punishment, prevails here by express statute.

The dimensions of the wound, if it be an incised wound, are required to be stated, according to most of the authorities.

X. As a thirteenth ground of error it is alleged that the jury came into court and rendered the following verdict: "We, the jury, find the prisoner Mary Ann Keech, *alias* Mary Ann Newton, guilty of the charge, viz: Accessory before the fact to murder in the first degree." Wherefore the court charged them that the form of the verdict should be "guilty" or "not guilty." The jury then retired and brought in a verdict of "guilty."

It is insisted that this is a special verdict, and is, there-

fore, not amendable as to matter of fact. In the present case, as the indictment charged the accused as an accessory before the fact, the alteration in the form of the verdict was immaterial, and, therefore, the proceeding on the part of the court and jury was not erroneous. The verdict, however, as first brought in, showed that the offense, as found by the jury, was one which should not have been tried until the principal had been tried and convicted, or they should be tried together.

XI. Lastly, it is alleged that the court erred in omitting to ask the prisoner before pronouncing the sentence, whether she had anything to say why the sentence of death should not be pronounced upon her.

It is laid down by Bishop (Cr. Pro. 1., § 865) that it is indispensably necessary that this ceremony should be observed in capital cases, and that it should appear of record that it was observed, and the authorities cited sustain this conclusion. (4 Bl. Com. 370, 375, note 2; 4 Burr. 2086; 3 Mod. 265; Rex vs. Speke, 3 Salk. 358; Rex vs. Geary, 2 Salk. 630; West vs. the State, 2 Zabriskie, N. J. 212; Hamilton vs. Com. 4 Harris, Pa. 129; Safford vs. People, 1 Parker C. C. 474; Dyson vs. the State, 26 Mississippi, 362; Crim vs. the State, 43 Ala. 53.)

But although it may be sufficient ground for arresting or setting aside the judgment or sentence, it does not seem to be good ground for a new trial. If, in a capital case, the court had omitted this traditional ceremony of asking the prisoner why the sentence of the law should not be pronounced, (material only because the prisoner is then and thereby informed that sentence is about to be pronounced, and that he may then urge any reason why the final judgment should not be entered,) the utmost that may be asked is, that the judgment be set aside and the prisoner remanded to the proper court to be dealt with according to law, the verdict standing unimpaired.

The judgment is reversed and the case remanded to the

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Circuit Court of St. Johns county, with directions that the indictment be quashed for the reasons herein stated.

WILLIAM NEWTON, PLAINTIFF IN ERROR, vs. THE STATE
OF FLORIDA, DEFENDANT IN ERROR.

1. The accused was indicted for murder, and another person as an accessory; the accessory being tried first, the principal was used by the State as a witness against the accessory, who was convicted. On being arraigned for trial the principal pleaded that he was entitled to be discharged, on the ground that he had been used as a witness against, and secured the conviction of, the accessory. *Held*, that the plea was bad; such matters should be addressed to the Executive power of pardon, and not the courts.
2. It is alleged that according to the evidence the name of the person killed was Ellen Keech, and not Ellen Wells, as charged in the indictment, and that judgment should be arrested for that cause. *Held*, that though there was some confusion in the evidence as to the true name, yet it was for the jury to determine as to the identity of the person named in the indictment and the proofs. It is generally sufficient to give the name by which the person is usually known.

Writ of error to the Circuit Court for St. Johns county.
Accused found guilty of murder in the first degree.

John B. Stickney for plaintiff in error.

Mr. Attorney-General Cocke for the State.

Assignment of Errors.

First. That the court erred in overruling the motion to quash the original venire for grand jurors returned and filed September 20th, 1875, and also the special venire returned and filed October 1, 1875; and, also, the indictment found in the above entitled case filed October 1, 1875.

Second. That the court erred in overruling the special plea in bar on file in this case.

Third. That the court erred in overruling the motion to quash the panel of the petit jury.

Fourth. The venire for petit jurors returned and filed September 20th, 1875, showed that but eleven out of the twelve jurors named in said venire were summoned and returned by the sheriff; whereupon the panel becoming exhausted, upon the trial, the court directed jurors to be summoned from the bystanders or from the county at large to complete the panel—all of which was error upon the part of this court.

Fifth. The next error assigned is, that the court erred in overruling the motion for arrest of judgment and a new trial.

Sixth. It is apparent upon the face of the record that the record does not show that the defendant was asked by the court if he had anything to say why sentence should not be passed upon him.

Seventh. The record must show affirmatively that the prisoner was personally present at the time the sentence was passed.

Eighth. That the indictment does not charge murder in the first degree. It does not describe any act done "without authority of law." It does not set forth "the killing of a human being without the authority of law." It does not allege that both the assault and killing to be done with a "premeditated design to affect the death of Ellen Wells." It does not state the part of the body in which the wound was inflicted. It does not set forth a description of the wound.

RANDALL, C. J., delivered the opinion of the court.

Newton was indicted in St. Johns county for the murder of Ellen Wells, and was convicted and sentenced to be hung at the same time at which Mary Ann Keech was tried

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as an accessory. He sned out a writ of error, and assigns for error several grounds which are substantially the same as those assigned in the case of Mary Ann Keech *alias* Newton, vs. the State, and which are disposed of in considering that case. For reasons given in the opinion in that case the judgment must be reversed.

Several questions arose in the course of the trial which were not involved in the case of Mary Ann Keech, upon which error was assigned, and though not necessary to the decision of this case we will dispose of some of them, as they were fully argued upon the hearing and involve questions of practice.

Upon the trial of Newton, he pleaded in bar that he had been used as a material witness for the State upon the trial of Mrs. Keech, his accomplice, in which trial she was convicted upon his testimony—wherefore he says he should not be further prosecuted.

Blackstone says, (4 Bl. Com. 330, 331 :) "There is a species of confession which we read much of in our ancient books*****called approvement; and that is when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, in the same crime in order to obtain his pardon." This plea is addressed to the court. Formerly, in England, a promise of pardon came from the court, and, practically, the granting of pardons was controlled by the courts, and it was the course of things that pardons were recommended by the Judges. In this country this practice never existed, but according to the constitutions or laws of the States, the pardoning power is vested exclusively in the Executive branches of government. The obligation to grant a pardon or to give impunity to a person indicted for felony, does not here vest in the courts, and, therefore, the courts cannot listen to a plea of this character. The prosecuting officer, representing the Executive arm, exercises his discretion in regard to calling witnesses,

and if a felon desires a pardon upon such ground, he must address that department. The plea is bad and is without a precedent, so far as we are able to discover.

It is alleged that the court erred in overruling the motion in arrest of judgment, because it was shown by the evidence that the woman killed was Ellen Keech, and not Ellen Wells, as alleged in the indictment. While it is true that the law requires that the name of the person killed must be, as alleged, in the indictment, and this the court will never refuse to give to the jury in its charge, yet it is a question which the jury must decide as a matter of fact from the proofs. (State vs. Angel, 7 Iredell, 27.) There is, it is true, some confusion of proof as to whether the woman killed was the wife of Keech, but with the testimony before them they determined it, and we cannot say that they found a verdict against the evidence upon that question. A prosecutor in such cases may appropriately use an *alias* in describing the name of the person, if he has any doubt upon the matter. It is sufficient, however, to give the name by which the person is usually known. (Wharton Am. Crim. Law, § 250.) And a name acquired by reputation is sufficiently certain. (State vs. Gardner, Wright's O. Rep. 392; People vs. Freeland, 6 Cal. 95.)

The questions mooted in the brief of counsel as to the form of the indictment, &c., are not properly before us by any pleading or exception, and we will not examine them further than we have done in the case of Mrs. Keech, just decided.

The judgment of the Circuit Court is reversed, and this cause is remanded, with directions that the indictment be quashed.

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EDWARD N. DICKERSON, RESPONDENT, VS. JANE Y. ACOSTA,
APPELLANT.

1. Under the Act of Congress of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, which provides that unless the taxes therein mentioned shall be paid within sixty days from the time of levying the same, the title to the property taxed shall "become forfeited" to the United States, there was no effectual forfeiture until a sale had been made pursuant to the act. The act was designed to be a measure of revenue.
2. The sixth section of Article XV of the Constitution of this State reads as follows: "All proceedings, decisions or actions accomplished by civil or military officers, acting under authority of the United States, subsequent to the 10th day of January, A. D. 1861, and prior to the final restoration of the State to the Government of the United States, are hereby declared valid, and shall not be subject to adjudication in the courts of this State." If this is construed as an act of legislation whereby the property of one is transferred to another without due process of law, it is void by the Constitution of the United States; construed as a judicial act, it is void for the want of power in the convention or the people to determine the rights of parties, unheard and without notice. The evident purpose of the convention in adopting this section was to prevent the courts of this State from entertaining suits brought to set aside, reverse or annul any act or decision of officers of the United States, acting within the scope of their authority, but it does not control the power of the courts to determine the legal effect of such acts and decisions as evidence affecting the rights of parties, according to the ordinary rules of law.
3. The seventh section of the Act of Congress of June 7th, 1862, providing for the collection of direct taxes in insurrectionary districts, declares that the certificate of sale for taxes "shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale "that the certificate of the Commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act." *Held*, that the act should be so construed that the owner of lands sold for said taxes may show, for the purpose of defeating the certificate of sale, that no tax had been legally assessed, or that any other step necessary to be taken by the Commissioners had not been taken, and, thus, that they were without

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power to make the sale; and that all their essential proceedings which were not conformable to law were of no legal force to affect the title to the property.

4. A tax levied by the Direct Tax Commissioners of the United States, in 1863, in Nassau county, while a small portion only of the county had been subject to the military authority of the United States, was not authorized by the Act of Congress. The Tax Commissioners were not empowered to enter upon the discharge of their duties until the commanding General of the forces of the United States had established the military authority of the United States *throughout* the county.

Appeal from the Circuit Court from Nassau county.

D. L. Yulee for Respondent.

B. B. Andrews and B. M. Davis for Appellant.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court for the county of Nassau, in an action for the recovery of a lot of land in Fernandina, brought under the code.

The answer admits that appellant was in possession at the time of the commencement of the action, and alleges that she has been in the peaceable possession, under an adverse title, for upwards of seven years prior thereto. The cause was tried before the Judge, without a jury, and judgment was rendered in favor of plaintiff, from which appellant took an appeal.

The plaintiff having shown the evidence of his title, the defendant, appellant, produced a certificate of sale by the United States Direct Tax Commissioners for the State of Florida, in January, 1865, under an act of Congress providing for the collection of direct taxes in the insurrectionary States.

The Judge held that the certificate, as shown by the evidence introduced by the plaintiff, was void for several causes stated by him in his findings.

It is insisted by counsel for appellant that the "court

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erred in considering the title deeds and right of possession of the plaintiff in the land in question, anterior to the tax assessment and sale of the property by the United States Direct Tax Commissioners, in 1865, because prior to said assessment and sale the title to the lot in question had become *forfeited* to the United States, under section 4 of the Act of Congress, approved June 7, 1862."

Counsel refer to the opinion of this court in *Billings vs. Stark*, 15 Fla. 297. We discover nothing in the opinion of the court in that case to sustain the point here made. In that case the plaintiff claimed title by virtue of a tax certificate signed by a majority of the Board of Commissioners, and it was held that such certificate was *prima facie* evidence of title in the purchaser, and that the title was not overcome on the part of defendant by evidence of a former title and possession anterior to the tax sale. There was some testimony in that case tending to show certain irregularities in the assessment and sale; but it was not considered sufficient to impeach the certificate of sale, and upon this subject we said that "the defendant must defeat the plaintiff's case by showing that the assessment and sale were not made in conformity to law; that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the Act of Congress;" and that "the testimony as to the non-concurrence of the third commissioner in the assessment, notice and sale, as given in the record, does not invalidate the proceedings." There was nothing in the decision in that case which precluded or denied the right to inquire into the question of the legality of the proceedings of the Tax Commissioners anterior to the sale for the non-payment of taxes.

Counsel also insist, in argument, that the act of Congress relating to the collection of direct taxes in insurrectionary districts, and the proceedings of the officers appointed to carry that act into effect, were not merely in their operation

and purpose measures of revenue, but were auxiliary to the belligerent operations of the government of the United States in suppressing rebellion and reducing rebellious citizens to obedience, &c.; and that by the terms of the act, in case of the non-payment of the tax within sixty days after assessment, the title to the property taxes "became *forfeited* to the United States." (See Sections 2-3-4.) The Supreme Court of the United States, in *Bennett vs. Hunter*, 9 Wallace, 326, has construed the act in question to be an act to raise revenue, primarily, by collecting taxes upon lands, and incidentally, in some respects, to the suppression of rebellion; but that there was no effectual forfeiture of title until after a sale, and the sale would be invalidated by redemption. There is nothing in the act which looks to the giving effect to the principle of the ancient law of forfeiture.

Again, it is insisted that the courts of this State cannot go behind the acts of the United States Tax Commissioners to inquire into their regularity or validity, by reason of the sixth Section of Article XV of the Constitution, which reads as follows:

"All proceedings, decisions, or actions accomplished by "civil or military officers acting under authority of the United States subsequent to the 10th day of January, A. D. "1861, and prior to the final restoration of the State to the "government of the United States, are hereby declared valid "and shall not be subject to adjudication in the courts of this State," &c.

It is contended that this provision was intended to close the door to all inquiry into the legality of the acts of officers of the United States, civil or military, and that whatever was done by them within the scope of official action is legalized and must be accepted as valid.

If this constitutional provision is construed as an act of legislation, whereby the property of one is sought to be transferred to another otherwise than by due course of law, it is void by the Constitution of the United States. If the pro-

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vision is construed to be a judicial determination of the rights of the parties, it is equally void for the want of power in the convention of the people who adopted it to determine the rights of parties who were not before the tribunal, and who had no notice of the contemplated adjudication. This general principle was sufficiently illustrated by this court in *McNealy vs. Gregory*, 13 Fla., 417.

But we apprehend that this clause of the Constitution is susceptible of a legitimate construction, and that it may be effectual to promote the end sought by the convention to be attained. As we understand it, the "proceedings, decisions or actions accomplished by the civil or military officers acting under the authority of the United States," which are "declared valid," are such acts and decisions as were authorized by the military power of the United States, or by the effective acts of Congress, notwithstanding any law of the State in contravention thereof, the intention being to recognize the civil and military authority of the United States during the period of the war as paramount; and the provision that these acts and proceedings "shall not be subject to *adjudication* in the courts of this State," is a prohibition to such courts against taking cognizance of any suit or proceeding for the object and purpose of reversing or setting aside such acts and proceedings, as, for instance, the reversing or setting aside the judgment of a military court, or reversing or annulling any act of the Direct Tax Commissioners, or other officers, by a judgment or decree of the State courts directed against the proceeding itself.

This suit, however, was not brought for the purpose of setting aside or "adjudicating" any act or decision of the United States Tax Commissioners, but to recover possession of land. The defendant brings forward his tax certificate as evidence of his right of possession, and the question before the court was as to its admission as evidence, and the court decided to admit it. If the term "adjudicate," as used in the Constitution, means to decide upon its effect as evidence.

then the court should, in obedience to the Constitution, have refused to receive or to reject it, a proposition which illustrates its own absurdity. If it be contended that the prohibition contained in the section of the Constitution referred to is intended to prevent an examination into the truth of the contents of the tax certificate, to ascertain whether, in fact, any tax was levied by authority of law; whether, in fact, any notice of the levying of the tax was given, or that the owners of property had an opportunity to pay it; whether, in fact, a sale was made in the manner required by law; whether, in fact, the entire paper is false and fraudulent, we must hold that we cannot sanction any such construction of the Constitution.

Appellant contends and assigns for error that the court erred in considering the testimony introduced by the plaintiff for the purpose of affecting the regularity and validity of the sale otherwise than to show that the property was not subject to taxes, or that the taxes had been paid, or that the property had been redeemed according to the provisions of the act of June 7, 1862.

The plaintiff was permitted to show certain facts and omissions which occurred prior to the sale, and the court considered such facts and decided thereon adversely to the defendant.

Section 7 of the act provides that the certificate of sale by the Direct Tax Commissioners "shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale, and of the title of said purchaser under the same;" and further, the section concludes as follows: "*And provided further*, That the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

Very generally it has been held by the courts of various

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States, and by the Supreme Court of the United States, under the various statutes relating to tax sales, that a deed given upon a sale for the non-payment of taxes was not sufficient evidence of title, but only of the fact of sale, and that proof of the regularity of the anterior proceedings devolves upon the person who claims title under the collector's sale. To divest an individual of his property against his consent, every substantial requisite of the law must be complied with, and no presumption can be raised in behalf of a collector who sells to cure any radical defect in his proceedings. (Ronkendorff vs. Taylor, 4 Peters S. C. 349; 4 Cranch, 403.) And every prerequisite to the exercise of the power must precede its exercise. (Thatcher vs. Powell, 6 Wheaton, 119; Williams vs. Peyton, 4 Wheaton, 77.)

In a case decided in 1868 by Mr. Justice Miller, arising out of a sale by the United States tax-commissioners for Arkansas, he says: "Nothing is better settled in the law of this country than that proceedings *in pais* for the purpose of divesting one person of title to real estate and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness." (Schenck vs. Peay & Bliss, 1 Woolworth's C. C. R. 175.)

The language of the 7th section of the act of June 7, 1862, however, appears to shift the burthen of proof of the regularity of the anterior proceedings upon the party who attacks the certificate of sale. Its language is, that the "certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale, and of *the title of the purchaser* under the same." There can be no constitutional objection to this change of the rule, because the right of the former owner to avoid the sale on account of the non-compliance of the officers with the legal requisites is preserved.

The appellant objects, however, that the last paragraph of the section precludes any inquiry beyond the question

whether the property was subject to taxes, or that the taxes were paid, or that the property was redeemed after sale; and says that the title to the land is vested in him by means of the sale if the land was subject to be taxed and the taxes were not paid or the land not redeemed.

We cannot assent to a proposition so monstrous as this. It is not doubted that the government may sell property for taxes and make a good title to the purchaser. The very existence of the government depends upon this power, but in order to do this several things are essential. There must be a tax lawfully levied, an opportunity to pay it, a default and a sale, and these several matters must be conducted according to rules prescribed by the legislative authority or they cannot be exercised at all. The first thing to be regularly done is the levying of a tax authorized by law, which includes the listing, the valuation and the distribution or apportionment of the proper amount. If there has been no listing or valuation and no equal distribution of the tax, or if the tax upon the property of one-half the community is put designedly at an unequal proportion to that imposed upon the property of the other half, can there be no inquiry after a sale into the fraud and injustice of such proceedings? Is the auctioneer's hammer made more potent than constitutions and laws, and may the land of one man be transferred to another by force of an act of legislation which precludes inquiry? If such be the purpose of the act of Congress, we have no hesitation in declaring it of no force whatever.

The power of the tax-commissioners to sell lands for unpaid taxes depends upon the appropriate performance by them of the necessary preliminary steps, and if one be omitted the power is equally absent as though every thing had been omitted. And if no tax had ever been apportioned by them, and yet they had made a sale without notice and without an opportunity to pay or to prevent the

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sale, the property would be transferred beyond recovery if this law, as insisted upon, could be enforced.

Now, what is the first condition requisite to the levying of this tax? By the 6th section it is enacted, "That the said board of tax-commissioners shall enter upon the discharge of the duties of their office whenever the commanding General of the forces of the United States, entering into any such insurrectionary State or district, shall have established the military authority of the United States throughout any parish or district or county of the same."

The testimony of the witnesses, Governor Reed, Dr. Harrison and Billings, establish the fact that in 1863, when the commissioners commenced their operations in Nassau county, and fixed the amount of this tax and gave the notice that it must be paid in sixty days from January 31, 1863, at their office in Fernandina, there was no assessment for Nassau county, but only for the town of Fernandina on Amelia Island; that only Amelia Island was occupied by Federal forces, the balance of the county or more than four-fifths of it being and remaining under the control of the Confederate military power. The military authority of the United States from the time of the passage of the act of Congress had not been established throughout the county at the time of the imposition of the tax. The terms "parish, county or district," were used in the act to designate the municipal subdivisions of the Southern or seceded States, as in Louisiana they are called parishes, in Florida and other States counties, and in South Carolina they were called parishes or districts. The only other territorial subdivisions of the States by the name of districts, were the collection districts of the United States.

The legitimate intention of the act, as we are enabled to understand, was, that wherever the military commander of the United States forces in Florida should establish the military authority of the United States throughout any county in this State, then the tax commissioner should enter upon

the discharge of their duties and proceed to levy and collect taxes; and that until such military authority was established throughout the country so that the citizens could freely pass for the purpose of paying taxes, transacting business and taking care of their property, the tax commissioners had no right or authority whatever to impose taxes.

The condition that the authority of the United States should be established by the commanding general throughout the county or district where taxes are to be levied, is essential to the power to exercise their duties by the tax commissioners. The condition not existing, the right to levy taxes does not exist, for the commissioners could enter upon the discharge of their duties when the commanding general should have rendered the performance of their duties possible throughout the county, and not before. The fundamental principles of equality and uniformity in the imposition of taxes could not be observed in this instance except by an assessment of all the taxable real estate in the county. It appears that the tax commissioners failed to find any assessment roll or list for the county or the city, and proceeded to make an assessment *de novo*. How, then, could an uniform tax be levied upon the property of the county to produce its proper ratio of tax without knowing, as a basis of the computation, the total amount of the taxable property to be assessed within the county? This dilemma would have been avoided by deferring the assessment and levying of the tax until the time appointed by the act. The proclamation of the commanding general, announcing that the authority of the United States had been established throughout a county or district, would have been an appropriate signal for the taxing officers to enter upon their duties. The absence of such announcement, and the fact, proven by members of the commission and by those who were in military command, that the town of Fernandina was the only place in the county where the Confederate military power was interrupted, leaves no room for doubt that the time for levying

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the tax in any portion of the county had not arrived according to law, and that the tax levied, under the circumstances established by the record in this case, was levied without authority of law. The notice that the tax was fixed and must be paid within sixty days, was given, and the time expired before the authority of the United States was so established, and no new notice seems to have been given after such authority was established, without which no sale could afterwards be legally made.

This is all that is deemed necessary to be determined for the purpose of disposing of the present case. The further questions, whether levying fifty per cent. more of tax in one State than was authorized to be levied in another State upon a given valuation of property; and whether onerous conditions could be imposed upon the owners of property in one State before they would be allowed to pay their taxes, which conditions were not imposed upon the people of other States; and whether an additional sum could be imposed for costs, charges and expenses, without limit, except in the discretion of the commissioners and without express authority of law; and whether the commissioners could lawfully sell lands for taxes upon a day not named in a notice of sale, or on a day to which the sale had not been adjourned; these and other questions embraced in the assignment of errors are superseded by the conclusion we have reached, that the tax imposed upon the property in question was not authorized by law to be levied at the time it was levied, and that any subsequent sale therefor was, therefore, unauthorized and void, and carried no title to the purchaser. The certificate of sale, under the circumstances, is a nullity.

The judgment of the Circuit Court is affirmed.

JAMES T. SOUTTER AND JOHN MCRAE, RESPONDENTS, VS.
JACOB MILLER, APPELLANT.

1. The deed of trust executed by the Florida Railroad Company to Soutter and McRae, as Trustees, conveying certain lands and lots, in trust, to sell and convey the same by deeds of conveyance, and to devote the proceeds to the payment of liabilities of the company, is not a mortgage, but vests the legal title in the trustees, and they are the proper parties to protect the title of such lands as remain unconveyed by them.
2. The eighth section of the Act of Congress of June 7, 1862, for the collection of direct taxes in insurrectionary districts, provided that the owner might, at any time within one year after a sale of lands, prove to the satisfaction of the Commissioners that they belonged to a certain class of persons, and that they had been unable, by reason of the insurrection, to pay the taxes or redeem the lands from sale within the time limited for paying or redeeming the same, in which case the Commissioners were authorized to allow a further time to redeem the same, not exceeding two years from the time of sale; and any party interested may appeal from the decision of the Commissioners to the District Court of the United States. The plaintiffs, whose lands had been sold for taxes, applied to the Commissioners and made certain proofs, whereupon the Commissioners made an order that satisfactory proofs required by statute having been made, the plaintiffs were entitled to redeem within two years from the day of sale of their lands; and the plaintiffs within the two years redeemed the lands from sale—all which appeared by the records of the Board of Tax Commissioners; and no appeal was taken from their decision to the District Court. The defendant now claiming that the plaintiffs were not entitled to redeem the lands sold, it is *held*, that the Board of Tax Commissioners were made by law the judges of the sufficiency of the application and the proofs, and their order standing unreversed, it is conclusive, the courts of the State having no power to review that judgment. The redemption by the plaintiffs extinguished the certificate of sale.

Appeal from the Circuit Court for Nassau county.

D. L. Yulee for Respondents.

Friend & Hammond for Appellant.

Soutter and McRae v. Miller.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court for the county of Nassau, in an action for the recovery of real property, the legal title to which was claimed by the plaintiffs (respondents) as trustees of the Florida Railroad Company.

The answer of the defendant puts in issue the right of the plaintiffs to bring suit; denies the allegations in the complaint, and claims that he had been in the peaceable possession of the premises under a title adverse to that of the plaintiffs for seven years and upwards prior to the commencement of this suit.

The cause was submitted to the judge without a jury upon the pleadings and proofs, and judgment was given in favor of the plaintiffs, that they recover possession of the lots described in the complaint. The defendant appealed.

The plaintiffs proved their title by exhibiting a deed of trust executed by the Florida Railroad Company to them, as trustees, containing the usual terms of grant, bargain and sale, and the habendum clause as follows: "To have and to hold the above described premises, * * * to the said parties of the second part, their heirs, successors and assigns, as their absolute property, in fee simple forever, free and discharged from all incumbrances," &c.; and in trust that the grantees shall, from time to time, as may be required by the grantor, execute leases, deeds and other conveyances of the same at appraised values, and receive the purchase money and rents, and with the proceeds of sales and leases, first, pay the expenses of the management of the trust, including surveys, location, &c.; and secondly, pay the interest upon certain bonds contemplated to be issued by the grantor; third, to pay the necessary expenses of grading, improving the property in Fernandina and Cedar Keys; fourth and fifthly, to buy in the bonds, or invest in good stocks, to be held as a sinking fund. The grantees, then,

agree to perform the conditions, sell the lands and lots, and render accounts from time to time.

The defendant insists that this instrument is, in the law, merely a mortgage executed to them for the security of the bonds, and therefore is not evidence of title upon which they may recover possession; and counsel refer to the act of the Legislature passed January 8, 1853, which prohibits mortgagees from acquiring possession until foreclosure and sale; and that the railroad company is the only proper party to bring suit.

It is clear, however, that this conveyance, as to the parties in this suit, is not to be treated as a mortgage, nor the trustees as mortgagees. An estate in the land for all the purposes of the trust is created by it, and the law referred to is not applicable to it. The legal title, with full power to sell and convey the fee, is expressly given, and the estate is to be treated according to the law of trusts, the proceeds of leases and sales of the lands only being pledged to the use of the bond creditors. A deed by the trustees carried the fee without the formality of a decree by virtue of the power to convey.

"With respect to the duty of trustees, it is still held, in conformity to the old law of uses, that permanency of the profits, execution of estates and defense of the land, are the three great properties of a trust. So that the Court of Chancery will compel trustees * * * * to defend the title of the land in any court of law or equity." 1 Cruise's Dig., Chap. 4, Sec. 1; 10 Johnson, 495; McRaeny, Trustee, vs. Johnson & Moore, 2 Fla., 520.

The trustees, therefore, are the proper parties to bring this suit, as the deed of trust vested the legal title in them.

The property in question was sold by the United States Tax Commissioners on the third day of January, A. D. 1865, and appellant claims title under their certificate of sale. The plaintiffs, to sustain their title as against the tax certificate and sale, produced a receipt signed by one of the tax com-

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missioners, showing that John McRae, one of the plaintiffs, had, on the twenty-first day of December, A. D. 1866, paid the amount of the tax, penalty, costs and interest and expenses of sale, &c., charged against the lot in question for the redemption of the lot from said sale, and certified that said McRae had appeared and made oath in due form of law to support the Constitution of the United States. The plaintiffs also introduced a transcript of the proceedings of the Board of Tax Commissioners, had on the 28th April, 1866, at which time all the commissioners were present, from which, it appears, the following order was made: "It appearing that the said lands were conveyed by said company to James T. Soutter and John McRae, in trust, by a deed duly recorded and in evidence, and that Marcellus A. Williams is the attorney, in fact, of said trustees; and it further appearing that said Soutter and McRae applied for the redemption of said lands within one year after the day of sale by the commissioners, and perfected the proofs required by statute: It is ordered that said trustees, James T. Soutter and John McRae, are entitled to redeem said lands at any time within two years after the day of sale thereof on payment of the tax, penalty and interest, together with the costs and additional expenses provided for by statute, and on taking the oath to support the Constitution of the United States."

The court below found that the lot in question was lawfully redeemed by the plaintiff from the tax sale mentioned in the certificate, and this is assigned as error.

The eighth section of the act of Congress of June 7, 1862, provides "that at any time within one year after the said sale by said commissioners, any person, being the owner of any lot or parcel of ground at the passage of this act, who shall, by sufficient evidence, prove to the satisfaction of said board of commissioners, that he or she, after the passage of this act, has not taken part in the present insurrection against the United States, or in any manner abetted

“the same, and that, by reason of said insurrection, he or
“she has been unable to pay said tax or redeem said lands
“from sale within the time above provided for, [sixty days,
“as provided for by Section 7,] the said board of commis-
“sioners may allow him or her further time to redeem the
“same, not exceeding five years from the day of sale. * * *
“From their decision, the United States or any party in in-
“terest may appeal to the District Court of the United
“States for said district, which is hereby authorized to take
“jurisdiction of the same as in other cases involving the
“equity of redemption.”

It thus appears that after a sale a certain class of persons may be allowed two years within which they may redeem their lands sold for the direct tax, and the Board of Tax Commissioners are invested with the judicial authority to determine whether the applicant belongs to that class. The commissioners met, heard the application, decided that the application was made in due time, that the applicants belonged to the class entitled to redeem within two years after the sale upon making payment and taking the requisite oath, and entered in their records an order to that effect. Within the two years one of the owners appeared and paid the necessary amount to one of the commissioners at their office, in Fernandina, and took the oath as required.

The board of commissioners having heard and decided the application, their determination is binding upon all persons unless an appeal was taken, as provided in the act. It does not appear that an appeal was taken. Their decision, then, is final and conclusive. It is objected that it does not appear that the applicants made the necessary proofs to show that they were entitled to redeem within two years. We cannot judge of that, because the commissioners are made the judges of the sufficiency of the application, and of the proofs, and we have no appellate power to review their judgment. The district court is authorized, upon appeal, to review their judgment, and that court, not having heard and reversed it,

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it is conclusive upon all persons and courts as to the right of these parties to redeem.

The parties entitled having redeemed by payment of the necessary amount of money to the officer authorized by law to receive it, the certificate and all the rights of the purchaser under it became extinguished.

This cause was heard upon brief and argument in connection with the case of Edward N. Dickerson vs. Jane Y. Acosta, and some of the points made and errors assigned in the case at bar are disposed of in that case.

As to the statute of limitations, it appears that this suit was commenced within the time prescribed by law.

As we find no error in the judgment of the Circuit Court, it is affirmed.

EX PARTE HILLIARD J. FINCH.

The granting of a writ of error to a judgment in a habeas corpus proceeding, is a matter of discretion in this court. The proceeding is *ex parte*, not requiring notice unless so directed by the court. A petition setting forth the nature of the case, accompanied by a certified copy of the record, is the proper basis for such motion.

Writ of error from the county of Madison.

Attorney-General W. A. Cocke moved to quash the writ.

Mr. Attorney-General W. A. Cocke for the State.

This case is brought before the Supreme Court upon a writ of error on an application for a writ of error refused by the court below.

This is a peculiar proceeding, held under an act of the Legislature of Florida. Chap. 79, page 399, of Bush.

It appears from the record that the petitioner was arrested

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and brought before a justice of the peace and bound over to appear before the grand jury at the next ensuing term of the Circuit Court for Madison county.

The party appeared, and was presented by the grand jury, and process issued for his arrest. He was arrested and committed to jail; application was made to the Judge of the Circuit Court for bail, and an examination of the testimony had and bail refused. This court cannot examine into any matter going to the merits of the case, but simply whether there is any doubt as to the accused having committed murder. I refer the court to the testimony.

Patterson and Pope, and John F. White for Plaintiff in Error.

The mere fact that a grand jury has found an indictment for murder does not preclude an inquiry into the facts of the case to ascertain whether the offense may not be of such grade as to entitle the prisoner to bail. 38 Illinois, 494, and cases there cited (in brief) from six States.

The prisoner is entitled to bail even after an indictment for murder. *Ex parte* Bryant, 34 Ala., 270, a case similar to the one at bar; see also *ex parte* Vaughan, 44 Ala., 417, a case wherein bail was refused for want of *evidence*; Hurd on Habeas Corpus, 438-446.

Every reasonable doubt should be given to the prisoner on application for bail, even under indictment for murder. Jones *ex parte*, 20 Ark., 9; see also Good *et al. ex parte*, 19 Ark. 410.

Bail at common law; powers of the court to grant bail; origin of the phrase; "proof evident or presumption strong," and construction of the same. 43 Miss, 1.

A person is entitled to bail after indictment found, when the proof is not evident nor the presumption great. 25 Texas, 519.

"A prisoner indicted for murder in the first degree may sue out a writ of *habeas corpus*, to be let to bail, and, upon

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proof that he is guilty of a bailable homicide, he should be allowed to give bail." 3 Ind., 293, (Porter.)

The power of the court to bail, even after conviction, same as Court of King's Bench. 24 Ga., 391.

The power of the court to bail in all cases, even after indictment for murder, when the proof is not evident, nor the presumption great. 2 Parker C. R., (N. Y.,) 570.

Other authorities on the same point: 28 Ala., 89; 14 Iowa, (6 White,) 404; 8 Abb., (N. Y.) N. P., 27; 30 Miss., (1 Geo.) 673.

The Constitution of the State of Florida, in reference to bail, is similar to that of some of the States above referred to.

1. Constitution of Florida: "All persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great."

2. Statute of Illinois: "All persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great."

3. Constitution of Mississippi: "All persons shall, before convicted, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great."

WESTCOTT, J. delivered the opinion of the court.

Whether a writ of error shall issue from this court to bring up the record of a judgment in a case of *habeas corpus* is a matter of discretion with the court. It does not issue as a matter of course, either from the court or the clerk's office. This discretion cannot be intelligently exercised upon the mere motion of the party seeking the writ without any statement of the case which he proposes to present. A petition setting forth the nature of the case, accompanied by a certified copy of the record of the judgment, is the proper basis of a motion in this court for the writ. This motion is an *ex parte* proceeding, and unless so directed by the court, there is no necessity for notice to the adverse party. This

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was the practice adopted in the case of *ex parte* Edwards, 11 Fla., 174. An examination of the papers will show that that case was presented upon petition.

HILLIARD J. FINCH, PLAINTIFF IN ERROR, VS. THE STATE
OF FLORIDA, DEFENDANT IN ERROR.

When a person is indicted for murder or other capital offense, he is entitled, upon *habeas corpus*, to produce such evidence as may operate to convince the court that the offense is of such grade, or that there are such strong doubts in the case that a jury should not, upon the case as presented, convict of a capital offense for the purpose of being discharged on bail.

Patterson and Pope, and John F. White for Plaintiff in Error.

Mr. Attorney-General W. A. Cocke for the State.

RANDALL, C. J., delivered the opinion of the court.

It was intimated, after the close of the argument, that we should undoubtedly affirm the judgment of the Circuit Court, refusing to let the petitioner to bail for reasons then orally stated. It was also intimated that no case had been cited by counsel in which the court had, after indictment for murder in the first degree, under a statute like that of Florida in regard to that crime, admitted to bail. Counsel for petitioner has, since then, referred us to several cases in which persons indicted for murder have been admitted to bail either upon inspection of the testimony taken before the committing magistrates, or of the testimony before the grand jury, (which, in some States, is preserved and filed,) or upon testimony taken upon notice to the prosecutor and the prosecuting attorney. We have also given attention to the sub-

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ject by consulting such authorities as were at hand, within the brief time at our disposal, and the conclusion at which we arrive is, that the petitioner is entitled, upon habeas corpus, where he is indicted for murder or other capital offense, to produce such evidence as may operate to convince the court that he is guilty, if at all, of an offense of such grade that he is entitled to be discharged on bail, or that there are such strong doubts that, upon the case as presented, a jury should not convict of the capital offense.

Judge Tallmadge, of New York, in a very able review of the opinion of the court in McLeod's case, published in the appendix to 26 Wend., page 697, says in concluding: "The true rule upon the subject of bail or discharge, after indictment for murder, undoubtedly is, for the judge to refuse to bail or discharge upon any affidavits or proof that is *susceptible of being controverted on the other side*. When, however, the prisoner's evidence is of that positive and certain character that it cannot be '*gainsaid*,' then the prisoner is entitled to be bailed or discharged, as in the case where the man supposed to be murdered is living; where the prisoner has been tried and acquitted of the same offense; or where the supposed murder was a homicide committed in a war between two nations."

This review was strongly endorsed and its conclusions commended by Chancellor Kent, Chief Justice Spencer, Roger M. Sherman, Simon Greenleaf and other eminent jurists and writers as "entirely conclusive upon every point."

We have therefore examined the testimony and proceedings brought up by the writ of error, and upon consideration of the evidence before the Circuit Judge, we are not disposed to reverse his judgment. Nor do we think our conclusion would have been different had the Circuit Judge ruled otherwise in the several matters embraced in the exceptions.

As to the question raised upon the fact stated in the rec-

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ord that the indictment was found by a grand jury composed of fourteen jurors, while it is insisted that the law requires that there should have been at least sixteen jurors, we will not consider it in the present case. Such question may be tried on plea in abatement, or motion to quash, according to practice at *nisi prius*. The indictment was found in a court of competent jurisdiction, and any error in its proceedings may be corrected by the writ of error.

The judgment is affirmed.

WILLIAM KENNEDY VS. THE STATE OF FLORIDA.

1. Previous to the constitutional amendments of 1875, the Circuit Courts had no jurisdiction to try a party charged with a misdemeanor, except upon appeal from the county court, and a judgment of the Circuit Court upon a conviction for a misdemeanor tried upon indictment in that court, was void.
2. An indictment charging an "assault with intent to kill," charges a misdemeanor under an act of February 10, 1832, the penalty not being imprisonment in the State prison; and the offense is not included in the provisions of Section 46, Chapter 3 of the Criminal Code of 1868.

Writ of error to the Circuit Court of Orange county.

No counsel appeared for the Appellant.

Attorney-General W. A. Cocke submitted the case on the part of the State.

RANDALL, C. J., delivered the opinion of the court.

Plaintiff in error was indicted for an "assault with intent to kill," under an act of February 10, 1832, (Thompson's Dig., 490,) the punishment for which is prescribed to be "by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, at the discretion of the

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jury." Accused was tried in April, 1875, and sentenced, upon conviction, to imprisonment in the State prison.

The statute of 1868, relating to crimes and punishment, provides that any crime punishable by death or imprisonment in the State prison is a felony, and every other offense is a misdemeanor.

The original jurisdiction of the Circuit Courts, as defined by the Constitution, (before the late amendments, which were adopted after the trial took place,) in criminal cases, was confined to the trial of felonies, (Section 8, Article VI,) and the appellate jurisdiction to the trial of misdemeanors upon appeal from the county court.

The offense charged in the indictment not being punishable by imprisonment in the State prison, is not a felony under the statute. The Circuit Court, therefore, had no original jurisdiction at the time of this trial, and the proceedings and judgment were void.

The Constitution gives the Supreme Court appellate jurisdiction in "criminal cases in which the offense charged amounts to felony." (Section 5, Article VI.) The jurisdiction being thus confined, we can neither affirm nor reverse the judgment, and the writ of error must be dismissed. (Sutton vs. The State, 13 Fla., 670.)

The offense here charged is not included in the provisions of Section 46, Chapter 3, of "an act to provide for the punishment of crime and proceedings in criminal cases," approved August 6, 1868.

Writ of error dismissed.

DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, 1876.

THE ATLANTIC AND GULF RAILROAD COMPANY, APPEL-
LANTS, VS. GEORGE W. ALLEN, COLLECTOR OF REVENUE
FOR SUWANNEE COUNTY, RESPONDENT.

1. The charter of a railroad company providing "that the said railroad and its appurtenances, and all property therewith connected, shall not be taxed higher than one half of one per cent. upon its annual net income," is a contract between the State and the company, the obligation of which cannot be impaired by subsequent action of the State.
2. Upon the amendment of a charter of a railroad company (whose road was thus exempt from taxation) authorizing it to construct a branch road, the branch road, when constructed, became subject to the provisions of the original charter, and the right of exemption from taxation therein granted attached with full force to the branch road.
3. A statute providing that "all rights" as to a line of railway which "are and have been legally vested" in one corporation shall pass to another corporation upon a sale by one to the other, is sufficiently clear and certain to pass a right of exemption from taxation, if such right exists in the vendor company at the time of sale.
4. The railroads exempted from taxation under the 18th section of the act entitled "an act to provide for and encourage a liberal system of internal improvements in this State," approved January 6, 1855, were such roads only as were a part of the State system thereby created, and the railroad from Live Oak, Florida, to Lawton, Georgia, was not embraced therein. This section of that act construed.

The Atlantic and Gulf R. R. Co. v. Allen.

5. The duration of a franchise or right granted by the Legislature to a corporation is fixed by the constitution operative at the time of the enactment, or by the enactment itself. The rights passing to the Atlantic & Gulf Railroad Company under the act of 1866, are coexistent with the franchise to be a corporation therein granted.

Appeal from Circuit Court for Suwannee county.

John F. White for Appellants.

I. The bill filed by complainants in the court below claims that by virtue of the provisions of the act incorporating the Pensacola & Georgia Railroad Company, and the amendments thereof, and that by virtue of the provisions of the act of 1855, commonly called the Internal Improvement Act, there was a contract entered into between them and the State of Florida in regard to taxation, the obligations of which are violated by that part of the act of 17th February, 1874, which seeks to impose a tax upon their road; that so much of said act as seeks to impose said tax violates Article I, Section 10, of the Constitution of the United States, and conferred no authority upon the defendant in the court below to collect the said tax as attempted.

I. In support of these views, it is insisted that the act of 8th January, 1853, incorporating the Pensacola & Georgia Railroad Company, and the acts amendatory thereof, passed respectively 22d December, 1859, and the 14th December, 1866, must be taken and construed together as one act.

II. That this follows, and is the result of that well established rule laid down by all the books in regard to the construction of statutes or contracts, that the *intention* of the parties must prevail, and that such *intention* is to be deduced from the whole and every part of a statute or contract taken and compared together. 1 Kent Com., § 462; Coke on Litt., 381, note *a*; Chief Justice Marshall, 12 Wheat. 332.

And this principle is carried so far as to apply even

though some of the statutes have expired and are not referred to in the other acts, when the acts are in "*pari materia*," because a code of statutes relating to one subject must have been governed by one spirit and policy, and intended to be consistent and harmonious in its several parts and provisions. 1 Burr, 445; Dwaris on Statutes, 569; 15 Johns. 380; 10 Fla. 145.

The Supreme Court of Florida sustains this view in Harroll against Harroll, (8 Fla.,) and say it is a rule of law in construing statutes that the *original* act and the *amendments* are to be viewed as one act. 8 Fla. 46.

Plowden says "these are rules by which the sages of the law have *ever* been guided," and "they are maxims of sound interpretation which have accumulated by the experience and are ratified by the approbation of ages." Plowden, 205.

Appellants' road, like the trunk road, has been held exempt from taxation from the time of its construction until 1874, except as provided for in the charter, and we hold that the long acquiescence in this construction of the original act of incorporation and amendments thereof fixes this construction. 1 Cranch., 299; 1 Wheat., 304; 6 Wheat., 264.

The Supreme Court of the State of Georgia, in a recent case, very similar to the case at bar, uses the following language: "We must look to the original charter in order to ascertain what those rights, privileges and immunities are, inasmuch as the same are not specified in the new consolidation act." C. R. R. & B. Co. vs. State; S. W. R. R. Co. vs. State, page 101, pamphlet edition, January, 1875.

The plain and unmistakable language used by the Legislature in the passage of the act of 1859 and the act of 14th December, 1866, clearly shows the intention of the Legislature to be such as is here urged. The language is as follows in each case:

"An act to amend *the act* entitled an act to incorporate

the Pensacola and Georgia Railroad Company." Acts of December 1859, 1866.

The rule laid down by this court and cited in Harroll against Harroll (8 Fla.) applies with peculiar force in the case at bar. Where the statute is an act of incorporation conferring a charter, and delegating, limiting, and specifying powers therein, the act becomes the constitution of the company incorporated, and like any other constitution when amended must be construed with the amendments as one entire instrument.

III. Having, as we think, shown that the act incorporating the Pensacola and Georgia Railroad Company, and the amendments thereof passed in 1859 and 1866, are to be taken as one act, we now proceed to show that there was a *contract* therein in regard to taxation, the obligations of which are violated by the revenue act of February 17, 1874.

The 16th section of the act of incorporation stipulates that the "Pensacola and Georgia Railroad and its *appurtenances*, and all property connected therewith, shall *not* be taxed *higher* than one-half of one per cent. on its annual net income." Pamphlet Act 1853, Section 16, p. 48.

The act of 17th February, 1874, under which appellants' road is attempted to be taxed in this case, levies a higher tax than one-half of one per cent. on its annual net income, and is a tax upon the entire property owned by appellants in the road. Act of 17th February, 1874, Section 47, etc.

IV. Appellants further insist that the act of 17th February, 1874, violates the obligation of the *contract* under the provisions of the act of 1855, commonly called the Internal Improvement Act, which enters into and forms part of the contract made with appellants through their grantors, and subsequently *ratified* by the State of Florida, 14th December, 1866. Bush's Digest, p. 370, Sections 18-24; Act 1853, Section 4, p. 44; Act 14th December, 1866, p. 45.

V. Appellants hold that the contract embraced in the act of incorporation and the amendments thereof, and in the

Internal Improvement Act, is protected by the Constitution of the United States, where the contract is based upon a consideration received or supposed to be received, and that this has been so often decided that the consideration can no longer be considered an open one. Cooley's Con. Lim., side p. 281, and authorities there cited.

The Supreme Court of the United States says that these principles have so often been set forth that it is a work of supererogation to enunciate them again. 13 Wallace, 646, 264.

The following rules for the construction of the contract are respectfully submitted:

I. The *intention* of the contracting parties at the time the agreement or contract was made, must control the construction of the contract. Dwaris on Stat., 658, 698, 702, 703; Cooley's Con. Lim., 58-9.

II. That the intention is to be found in the words taken in their natural sense, and the words used in this contract are, "*shall not be taxed higher than one-half of one per cent. on the annual net income.*"

III. The intention is to be found by acts of the same character, passed at or about the same time, on the same subject matter. Acts 1853 chartering various railroads, and the spirit of the Internal Improvement Act.

IV. The intention may be inferred from all subsequent legislation up to 1869, on the subject of railroads, by which it will be seen that they were held exempt from taxation as now exempted.

V. The intention of the contracting parties is unmistakably shown by the subsequent conduct in dealing with this question, for from 1853 to the date of the levy made by the Collector of Suwannee county in this case, no effort has been made to enforce the collection of the tax otherwise than as in accordance with the act of incorporation. 1 Cranch., 299; 1 Wheat., 3, 4.

VI. Appellants insist that if it should be held that their

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road is an independent branch road, yet that the same was built under and by virtue of and in accordance with the provisions of the act incorporating the Pensacola and Georgia Railroad Company and amendments, and being completed according to the charter, the *contract* as to it became an executed contract, which differs in nothing from a grant.

A grant amounts in its own nature to the extinguishment of the right of the grantor, and that a party is, therefore, estopped by his own grant. 6 Cranch., 183; Cooley's Con. Lim., side p. 274.

VII. Appellants further insist that the State of Florida is estopped from attempting to collect the tax as proposed by the act of 1874, because "the rule of law is clear that when one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on the belief so as to alter or change his previous condition, the former is precluded from averring a different state of things existing against the latter at the same time." Bigelow on Estoppel, 475.

Appellants' bill alleges that they were moved to make the investment in this branch road by the faith imposed in the guarantees and assurances contained in the acts of 1866, and prior acts. The demurrer of defendant admits this to be true.

Appellants further insist that the State is estopped from enforcing the collection of said tax, because "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against that person." Bigelow on Estoppel, 500; Act 14th December, 1866, page 45; 2 Curtis, 379.

But it is insisted that we have forfeited our charter and rights because of non-compliance with Section 17 of the act of incorporation.

This is denied.

I. Because appellants' road was completed within the time and according to the requirements of the charter.

II. Because the requirement of Section 17 is a condition subsequent, and does not, of its own force, destroy appellants' franchise, nor until proceedings are commenced on the part of the State to procure a judgment for forfeiture by a court of competent jurisdiction. 9 Wendell, 351; 23 Wendell, 255; 8 Wendell, 645.

III. Because the franchise remains good until judicially declared forfeited, in a suit in behalf of the State. 2 Beas., 46; 9 S & M., 394; 3 Amer. Rep.

Our bill of rights declares that no person shall be deprived of life, liberty or property without due process of law. Constitution of 1868.

"A forfeiture without due notice to the owner of the property, and without an opportunity of being heard on the question of the owner's culpability, is contrary to the bill of rights." 3 Amer. Reports, 636; 1 Brightley's Digest, page 115, Section 355, title, Forfeiture.

Where the Legislature violates the bill of rights, its action is void; the declaration in the bill of rights is in itself a prohibition. Cooly Con. Lim., side page 176.

But we are told that our franchise is a mere privilege, which can be revoked by the Legislature at its will or by a subsequent Legislature. This is denied, for—

IV. While it may be true of municipal corporations created for governmental purposes alone, yet a different rule obtains where a corporation is created like that of the appellants.

"That corporations which are granted, not as a part of the machinery of government, but for the benefit of the corporators, are held to be contracts, and that the grant of the franchise can no more be resumed by the Legislature, or its benefits be diminished or impaired without the consent of the grantees, than any other grant of property, unless the right to do so is reserved in the charter itself." Cooly Con. Lim., side page 279.

No such reservation is to be found in our charter.

. We hold that the act of 14th December, 1866, incorporating appellants is a grant, conferring on them the franchise of the P. & G. R. R. Co., which had vested in the branch road. 4 Curtis, 501-2.

But it is insisted that by the Constitution of St. Joseph, or the Constitution of 1845, (Thompson's Digest, page 47, Section 46,) that the charter of the P. & G. R. R. expired in twenty years.

V. This is denied, as the act of incorporation did not confer exclusive privileges on the Pensacola and Georgia Railroad Company. 10 Fla.

But it is alleged that appellants' rights are affected by the Constitution of 1865-'6, and by the revenue law passed under the same in 1866.

VI. This is denied, for Section 19 of the bill of rights, and Sections 2 and 3 of Article XI show that the convention respected the rights of appellants. Constitution of 1865-'6, Section 19, Bill of Rights; Sections 2 and 3 of Article XI.

The second section of the revenue act of 1865-'6 is in the following words: "Provided that no taxes shall be levied upon property specifically exempted by law."

Appellants further insist that if it were even otherwise, their rights would be protected by the Constitution of the United States against the Constitution and revenue act of 1865-'6. 13 Wallace, 646.

But it is insisted that the Pensacola and Georgia Railroad Company could not convey its purchase by a sale to complainants.

VII. To this we reply, while it may be doubted whether a franchise can be seized and sold under execution, contrary to the will of the owner, yet the owner may, with the consent of the sovereign, sell, transfer and convey it as other property. Bouvier's Law Dic. Title Franchise; 15 Wallace, 466; 10 Howard, 376.

As to whether the original contract contained in the act of incorporation and amendments was based upon a suffi-

cient consideration or supposed consideration, we need only to refer to the condition of our State with its valuable productions of cotton, sugar, tobacco, lumber, and naval stores shut out from the markets of the world in 1853, compared with the facilities for transportation and immigration after the construction of these roads, and to the consequent enhanced value of the taxable property of the State in the section traversed by them.

We conclude, therefore, that there was a contract between the contracting parties, based upon a sufficient consideration, stipulating that the appellants should not be taxed higher than one-half of one per cent. on the annual net income of their road.

And that as the act 17th February, 1874, does propose to collect a higher tax from the appellants upon their road, it violates the obligations of said contract, and is, therefore, void.

Mr. Attorney-General W. A. Cocke for Respondent.

The act of the Legislature of Florida requires a tax to be levied on the Railroads of this State. *Vide* Session Acts of 1874, Chap. 1976, Section 47.

The bill seeks to enjoin the collection of this tax on the ground of the illegality of the act of 1874.

The act of the Legislature of 1874, under which the railroad was taxed, was passed since the present constitution, that of 1868, was adopted. *Vide* Article XVI, Section 24 of the Constitution of 1868.

The act exempting the Pensacola and Georgia Railroad from taxation, as of the other railroads of Florida, is not operative in the present case.

If the company did not forfeit its charter it failed on its part to comply with the requisites of the charter, and to pay the interest on its bonds and the sinking fund. *Vide* the Act of January 6th, 1859, known as "An Act to Provide for and Encourage a Liberal System of Taxation." See 18th Section.

This creates no vested right over and above a mere *statutory privilege*. Cooley on Con. Lim., p. 283.

The constitutional prohibition on exemptions from taxation repeals a mere statutory exemption. *Vide* Blackwell on Tax Titles, Chapter 33.

There was no consideration on the part of the State. Cooley on Con. Lim., 281; Frask vs. Maguire, 18 Wallace; Railroad Company vs. Pennington, 18 Wallace.

As to consideration, *vide* Gilmore vs. Shebovgan, 2 Black, 510.

The act of 1855 was at the time of its passage unconstitutional. *Vide* Constitution of 1845; Thompson's Digest, Section 46, p. 47.

What are exclusive privileges on the part of a corporation? To use its property exempt from taxation. Bouvier Title Privilege; Worcester's Dictionary.

The Atlantic & Gulf Railroad is a branch of the P. & G. Railroad. See the act incorporating the P. & G. Railroad and amending its charter.

Then there was an act authorizing the P. & G. Railroad to sell its branch road. Act of 1866, p. 45.

When the A. & G. Railroad was put in possession of this *branch* of the railroad, the P. & G. had no franchises as to exemption.

It does not appear that there was a sale, and, consequently, the A. & G. has no franchise in this State.

If there was a sale the charter privileges were surrendered to the State. Angel & Ames on Corporations, § 776.

The privilege of exemption had passed from the P. & G. before the act of 1866 authorizing the sale was passed.

The act of 1866 authorizing the P. & G. Railroad to sell the road, with exemption from taxation, from Lawton to Live Oak, was unconstitutional. Con. of 1865, Art. XIII, § 2; *vide* Redfield on Railways, 2d vol., top pages 430-431.

Had the P. & G. Railroad a right to build a railroad from Live Oak to some point on the Georgia line ?

By the original charter approved January 8th, 1853, it had no such right.

By an act amending the charter of the P. & G. Railroad, it had a right to construct a road from its main line to the Georgia line, in Hamilton county. *Vide* Act of December 22d, 1859, § 2, Chap. 1021, p. 36.

Under this amended charter the P. & G. Railroad had a right to construct the road now extending from Live Oak, in Suwannee county, to some point on the Georgia line.

The opinion of the court in the case of the Fla., Atlantic & Gulf Central Railroad vs. P. & G. Railroad Co., 10 Fla., p. 145, affirming the decree of the Circuit Court for the Middle Circuit, sustains this point.

It is conceded that the P. & G. Railroad did construct this road, and that the iron was taken up by the Confederate State Government.

The P. & G. Railroad Company had a right to build this road.

Then, how does this question affect the right of the State to tax the road, according to the act of 1874? Exactly in the same manner as it could tax the P. & G. Railroad, were it in existence. And the court is referred to my brief in this case, maintaining the right of taxation to the P. & G. Railroad, because it had never complied with its charter; that it had been sold out, and that the Jacksonville, Pensacola and Mobile Railroad was substituted in its place by statute, and that the J., P. & M. Railroad could claim no exemptions from taxation that did not accrue to it as the successor of the P. & G. Railroad.

The act of the Legislature of Florida, authorizing the P. & G. Railroad to sell and convey to the A. & G. Railroad its branch running from Live Oak to Lawton, approved December 13th, 1866, could confer no privileges on that road which the P. & G. Railroad did not have. I have shown that the P. & G. Railroad was not exempt from the right of the Legislature to be taxed.

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The A. & G. is not lawfully exercising the functions of a corporation in the State of Florida, because there is no evidence of its ever having purchased that branch of the P. & G. Railroad running from Live Oak to Lawton, the title never having passed from the P. & G. Railroad, according to law, or even in obedience to the statute of December 13th, 1866.

It would appear from the failure of the P. & G. Railroad to comply with the act of December 13, 1866, that what is considered a sale of the Live Oak branch is a nullity and that the act thus far is a dead letter, and that the A. & G. is exercising the functions of a corporation without having complied with the statute, and has no right whatever in this State, as far as the law and the records show, that will exempt it from taxation.

The case of "Erie Railway Company" vs. Pennsylvania, 21 Wallace, 492, sustains the legal view that a State, by enactments exempting State Roads from taxation, does not loose the right to tax other roads coming into the State. If the roads of the State of Florida are exempt from taxation by charter, it does not follow that the A. & G. Railroad from Lawton to Live Oak is exempt, for it does not claim to be a branch of the P. & G. Railroad, and it shows no title under the Act of 13th December, 1866.

George P. Rancy for Appellant.

This suit involves the question of the right of the State to tax the railroad from Live Oak to the Georgia line. Under Section 47, Chapter 1976, of Laws of Florida, a tax has been levied, and while the appellee and defendant was attempting to collect it, the appellant and complainant filed his bill, and a rule to show cause why an injunction should not be granted as prayed, was made. The defendant demurred to the bill, and the cause comes here upon an appeal from the Circuit Court's order sustaining the demurrer and dismissing the bill.

There is an agreement in the record made by counsel waiving the question of the equitable jurisdiction to enforce the collection of a tax.

The appellant claims that the property sought to be taxed is exempt from taxation; that it was exempt at the time the act of 1866 was passed, under which act, (Chapter 1573, Acts 1866, page 45), appellant acquired it, and that this exemption, whether total or partial, passed with the property to appellant.

We consider that, practically, the sole questions for argument here, as the allegations of the bill are admitted by the demurrer, are:

1st. Was this property exempt from taxation at the time the Pensacola and Georgia Railroad Company sold and conveyed it to appellant, and if so, what was the character of the exemption?

2d. If it was either entirely exempt from taxation, or only subject to a limited tax, is the State precluded by the act of 1866 (Chapter 1573) and its contract thereunder with appellant, as alleged in the bill, from taxing it otherwise, or in any greater amount than it was taxable at the time we purchased it?

The Act of 1853, Chapter 484, incorporating the Pensacola and Georgia Railroad Company, by Section 3 fixed the termini of the Pensacola and Georgia railroad at a point on the waters of Pensacola Bay and some point on the Georgia and Florida boundary line, to be determined by a Board of Directors. Section 2 of the act fixed the capital stock at \$1,500,000, with privilege of increasing it if necessary to \$3,500,000. Section 16 provided "that the said railroad and its appurtenances, and all property therewith connected, shall not be taxed higher than one-half of one per cent. upon its annual net income." This act was approved January 8, 1853.

December 22d, 1859, the Pensacola and Georgia Railroad Company by an amendment to its charter was empowered

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to build this "branch road." (Chapter 1021, page 36, Acts 1859.)

Prior to this time the company had accepted the provisions of the Internal Improvement law, and under that law and its original charter had constructed its road to a point east of the branch road. Having accepted the provisions of the Internal Improvement law, it became entitled to, and at the time of the purchase of the branch road by the appellant, was enjoying, the privileges offered or guaranteed thereby.

The 18th Section of the Internal Improvement law provides that the capital stock of any railroad company accepting the provisions of the act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, including work-shops and ware-houses, vehicles and property of every description needed for the purpose of transportation of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction, and for thirty-five years from their completion, and all the officers of the companies and servants and persons in the actual employment of the companies be exempt from performing ordinary patrol, jury, militia and road duty.

This section, it will be perceived, offered these benefits, and the companies accepting the provisions of the act became entitled to them. The only forfeiture clause in the act is in Section 30, which provides that no bonds shall be issued to the companies in any part of their roads not completed at the end of eight years from the passage of the act; and any company failing to grade twenty miles of road within four years from filing notice of the acceptance of the terms of the act, shall forfeit all right to its benefits. Within this clause it is apparent the Pensacola and Georgia Company never came, and if a sale under the third section of the act placed the company outside of the benefits of the act after the sale, this sale did not take place till after the

Atlantic and Gulf railroad had acquired the property under the Act of 1866.

Under the above facts we claim that the branch road was at the time of the purchase by appellants—

1st. Entirely exempt from taxation.

2d. That if not entirely exempt that it can be taxed no higher and in no other manner than as prescribed in Section 16 of the original charter, "one-half of one per cent. on annual net income."

We maintain the first proposition on the ground that the exemption of the capital stock of a company exempts the whole property of the company.

"A statute exempting the capital stock of a railroad company exempts all property of the company necessary to carry on the business." 14 Georgia, 275; 6 Gill. 288.

"The word 'stock' includes all the property of the corporation." 26 Georgia, 651.

"Under the statutory provision subjecting to taxation 'all property owned by incorporated companys over and above their capital stock,' the road-bed, machinery, depots and other property of the railroad company used by the corporation in operating its road, are exempt from taxation as a part of the capital stock of such company." 30 Mo. 550.

Under such a provision as this, of course, if the company owned property greater in value or amount than the value or amount of its capital stock, then such excess would be taxable, unless the statute provided that the specific property sought to be taxed should not be taxed.

The above cases and other cited on pages 846 and 847 of Abbott's Digest of the Law of Corporations, show the effect of such an exemption of the capital stock.

In the 14th Georgia case the facts were that the city of Rome had power to levy a tax on all persons and professions and property of every kind, whether real or personal, within its corporate limits, subject by the laws of the State to taxation, the tax not to exceed the State tax.

The charter of the railroad company provided that "the *stock* of said company shall not be liable to any duty whatever, unless such and no more as is now in banks in this State." Tax execution was levied upon property of company in Rome, Georgia. The court held as follows: "The property of a railroad company, within the city of Rome, held to be a part of its capital stock, and not liable to taxation by that city as property."

So then it is clear that an exemption of the capital stock of a company exempts its property, and as there was nothing in the amendatory act of 1859, which said that the exemption of the capital stock of the Pensacola and Georgia Railroad Company should not apply to or cover the branch road when built, there is no reason that we can see why the branch road is not as much exempt as any other property of the company. All of the stock of the company was exempt, whether the original \$1,500,000, or any increase thereof that may have been made under Section 2 of the Act of 1853, and consequently all the property it may have represented, or that may have been held under it. The case of the State vs. the Norwich Railroad Company, 30th Conn., cited on pages 846-7 of Abbott's Digest of Corporations, where the head note is given in full, shows that an exemption of capital stock applies to new as well as old stock.

The thirty-five year clause of Section 18 of the Internal Improvement law, it is clear, applies only to "the roads," &c., within the line of the Internal Improvement law. This is apparent from a careful consideration of Sections 2, 3, 18, 4, 11, 12, 13, 8 and 9.

It will be seen that the bonds were to be a lien upon this line. That the granting an exemption merely of the capital stock of a company accepting the provisions of the act, or building a particular section of the road, would have been of no benefit to the bondholder in case of a dissolution of the company from any cause. The exemption

would then have been dependent upon the continuation or existence of the stock, and in case it ceased to exist at any time prior to the maturing of the bonds, the bondholders' security would have been so much impaired, and could have been defeated by sale for nonpayment of taxes, the payment of which, whether it was made by the owner of the property or the lien-holder, was a burden upon and disadvantage to the security. Hence, to make the security better, the express limitation of thirty-five years, the period for which the bonds were to run, was declared.

The limitation in Section 15 of the original charter is an answer to any argument against the exemption based upon the idea of "monopoly," or "railroad rule," or "imposition."

2. But if this position is not sustained by the court, we submit that the rate and kind of taxation prescribed in Section 16 of original charter was the only taxation this property was liable to, and if this view is the correct one, we would remark that there is no law imposing a tax of this kind. The tax imposed by the act of 1874 is an *ad valorem* tax upon the property.

The amendment of 1859 merely gives the authority to build the road. But to whom does it give it? It is to the Pensacola and Georgia Railroad Company as it stood under its statutory creation. If the exemption of the capital stock by the internal improvement law is to be construed as above contended, then the Pensacola and Georgia Railroad Company stood at the passage of the amendatory act, and of the act of 1866 authorizing the sale, and afterwards, at least up to 1869, when the trustees sold out the road from Quincy to Lake City, with this feature of exemption applying to and affecting any amendatory act, not expressly or necessarily contravening it. If such is not the construction of the law upon an exemption of the capital stock of a company, then whatever the effect was, it stood with such effect as the law gives it as a part of the charter just as much as if incorporated in the original act of 1853. If it did not have the ef-

fect contended, it certainly had not the effect to repeal the exemption clause of the 16th section of the original charter. So, assuming that it had no such effect as to exempt all the property as contended for, the Pensacola and Georgia Company, as it stood with this 16th section, was the company. The Legislature was dealing with it as it had created it, and the amendatory statute should be taken as a part of the original, and the whole construed together as one act.

Applying this rule as laid down in *Harrell vs. Harrell*, 8 Fla., 46, *Sedgwick on Statutory Limitation*, pp. 68, 209-10, and 1 *Burroughs*, 447, the 16th section should be held as applicable to both the original and amendatory acts. Tax cases, 12 *Gil. and Johnson*.

Assuming, then, that this branch road was either entirely exempt from taxation at the time the appellant purchased it, or subject merely to the half of one per cent. taxation, we maintain that it is impossible for the State of Florida, under any guise, however ingenious, to impose any tax upon it, unless it is a tax of one-half of one per cent. upon the annual net income from the property, and not even this, if the property was entirely exempt at the purchase. This we maintain on the ground that a purchase by the appellant, under the act of 1866, created a contract that the appellant should enjoy the same exemption from taxation, and that the contract is inviolable. 4 *Wallace*, 143; 13 *Wallace*, 264; 13 *Wallace*, 269; 16 *Wallace*, 244; 2 *Wallace*, 36; 18 *Howard*, 331.

WESTCOTT, J., delivered the opinion of the court.

The 47th Section of Chapter 1976 of the Laws of Florida, (acts 7th sess., 1874, page 21,) provides "that the president and secretary or superintendent of every railroad company, whose track or road-bed, or any part thereof, is in this State, shall annually, on or before the second Monday in June, return to the Comptroller of the State, under their oath, the total length of such railroads, the total length and value

of such roads, including rights of way, road-bed, side track and main track in the State, and the total length and value thereof in each county, city and incorporated town in this State. They shall also make return of the number and value of all their locomotive engines, passenger, freight, platform, construction and other cars, and the value thereof shall be apportioned by the Comptroller, *pro rata*, to each mile of main track, and the Comptroller shall notify the assessor of each county through which such railroad runs of the number of miles of track and value thereof and the proportionate value of personal property taxable in their respective counties; and to such values thus apportioned the assessor shall add the value of all other real property, together with all fixtures, machinery, tools and other property within their respective counties; and upon the value thus ascertained, taxes shall be assessed the same as upon the property of individuals, and any agent of such company is authorized to pay such tax to the collector and retain the amount out of any money in his possession belonging to such road."

Section 24 of Article XVI of the Constitution of 1868, (the Constitution operative when the section of the revenue law above quoted was passed,) provided that "the property of all corporations, whether *heretofore* or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational or charitable purpose."

The Atlantic and Gulf Railroad Company, being in possession of, and operating as the owner thereof, a line of railway running through the county of Suwannee in this State, George W. Allen, the collector of revenue of that county, claiming to act under the provisions of the act of the Legislature and constitutional provision quoted above, made a seizure of certain property of the said railroad company with the purpose of selling the same to satisfy the tax alleged to be due the State of Florida, and was proceeding to take action looking to the sale thereof.

Under this state of circumstances, the Atlantic and Gulf Railroad Company file a bill in the Circuit Court of the Third Judicial Circuit of Florida for Suwannee county against said collector, setting forth the manner in which it acquired said property, and alleging that by virtue of the legislation under which it acquired the said property, and the right to own and operate the same as a body politic and corporate in the State the said road and all the property appertaining thereto was exempt from taxation; that the legislation referred to did not confer simply a privilege of temporary exemption of such property from taxation, which might be subsequently recalled by the sovereign; that such legislation constituted a contract, which could not be subsequently impaired by action of the State, either through a constitutional convention or an act of legislation passed in conformity to a provision of the Constitution. The bill prayed an order enjoining the sale threatened, for a perpetual injunction at the hearing, and for a decree declaring the act authorizing the tax unconstitutional and void. Upon the agreement of parties the sale was postponed. Subsequently the defendant interposed a demurrer to the bill. The ground of the demurrer was want of equity in the bill. Any question *as to the jurisdiction* of the court to enjoin the collection of taxes, was waived by the parties. Upon the hearing of this demurrer, the court sustained the same and dismissed the bill. From this decree this appeal is prosecuted.

The general question here involved is, whether, at the time the constitutional provision and the legislation above quoted authorizing this *ad valorem* tax were passed, this property was exempt from such taxation by virtue of a contract between the State of Florida and the Atlantic and Gulf Railroad Company. If such a contract existed, then it was beyond the power of both the convention and the Legislature thus to destroy it. The power of the State is limited in this respect by the Constitution of the United States, and this limitation extends as well to a convention of the people of

State as to the general legislative power appertaining to a state government.

This brings us to inquire how and in what manner this property was acquired by the Atlantic and Gulf Railroad Company, and whether it is, in its hands, exempt from this *ad valorem* tax. The bill alleges that it acquired this property from the Pensacola and Georgia Railroad Company, that by virtue of a contract with said Pensacola and Georgia Railroad Company "it became seized and possessed, in its own right, of the said road," and by virtue of the legislation of this State, it became entitled to all of the rights appertaining to said property in the hands of the Pensacola and Georgia Railroad Company, one of which, it claims, as exemption from such taxation as is here levied.

The act of the Legislature under which this property was acquired provides "that the P. & G. Railroad Company be and it is hereby authorized to sell and convey to the Atlantic and Gulf Railroad Company, of Georgia, the branch of their road commencing at Live Oak and running to the Georgia line, connecting with the branch of the road of the said Atlantic and Gulf Railroad Company, beginning at Lawton, on the said Atlantic and Gulf Railroad, in Georgia, and running to the Florida line, and all the rights, franchises and privileges of the said Pensacola and Georgia Railroad Company applicable to and connected with said branch road, in all respects as the same are and have been by law vested in said Pensacola and Georgia Railroad Company." (Chap. 1573, Section 1, Laws of Fla.) There is no room for doubt as to the effect of this legislation. It is plain and direct. It is as positive and definite as it could be made. The effect of the road to the Atlantic and Gulf Company under this act is to pass all the *rights, franchises and privileges of the Pensacola and Georgia Company in all respects as the same were, by law, vested in the Pensacola and Georgia Company*. The object, purpose and effect of the law is upon sale to vest the Atlantic and Gulf Company with the

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same rights as were in the Pensacola and Georgia Company. A right of exemption from taxation can be passed under the general language of "all the rights" as well as any other right. We can see no difference. In all cases the language must be clear to create such an exemption as is here claimed, but it is going too far to hold that *each right* must be enumerated in order to pass it. The term "all rights" embraces each right, and there is no room for the least doubt on the subject. The case of *Trask vs. Maguire*, 18 Wall., 405, covers the point here suggested, if, indeed, so plain a proposition needs any authority to sustain it. There was a sale in that case authorized by an act of the Legislature. "The act, under which the sale was made, provided that the purchasers should have all the rights, franchises, privileges and immunities, which were enjoyed by the defaulting company under its charter and laws amendatory thereof." Say the Supreme Court of the United States: "The new company thus acquired all the immunity from taxation which the original company possessed." The only difference between the act in the case before the Supreme Court of the United States and the act here, is, that in *Trask vs. Maguire*, it gave the purchasing company the rights and privileges which the old company had "under its charter and laws amendatory thereof," while here, the act gives the purchasing company all the rights which "are and have been by law vested" in the vendor company. The effect of the language is the same; one is equally as explicit as the other. Rights which vest under a charter and its amendments, and rights vested by law, are terms signifying the same thing.

In *Humphrey vs. Peques*, 16 Wall., 248, the act of the Legislature, construed by the court, provided "that all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained." Under the original act to incorporate the Northeastern Railroad Company, no exemp-

tion from taxation was made; under an amendment it was exempted. The Supreme Court held that after the passage of the amended act, "the Northeastern Railroad Company was, in law, as if it had originally been chartered" with all the rights conferred by the amended act, and that under the general language, granting "all the powers and rights" vested in the Northeastern Railroad Company, the right of exemption conferred by the amended charter passed to the Cheraw and Darlington Railroad Company.

The next question is, was this line of railway in Suwannee county, and its appurtenances, and all property therewith connected, exempt from the tax here levied in the hands of the P. & G. Railroad Company at the time of the sale to the Atlantic & Gulf Company? If it was, then such right passed to the A. & G. Company. This question has been discussed in two aspects. It is claimed that this line of road was exempt from all taxation by virtue of the provisions of the 18th section of an act entitled "An Act to Provide for and Encourage a Liberal System of Internal Improvements in this State," approved January 6th, 1855, (Chap. 610, Laws of Florida.) It is also claimed that the line of road was exempt from the tax here levied by virtue of the 16th section of the act incorporating the P. & G. Railroad Company, approved January 8th, 1853, Chapter 484, and the amendment thereof, approved January 15, 1859, Chap. 948.

The P. & G. Railroad Company was one of the companies accepting the provisions of the Act of January 6th, 1855; and the 18th section of that act provided, "That the capital stock of any railroad company accepting the provisions of this act shall be forever exempt from taxation, and the roads, their fixtures, and appurtenances * * * * shall be exempt from taxation while the roads are under construction, and for the period of thirty-five years from their completion." It is contended that an exemption of the capital stock of the P. & G. Company from taxation was an ex-

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emption of all of the property in connection with which the stock existed. As a general proposition it is true that the exemption of the capital stock of a company from taxation exempts the property in reference to which that stock exists, for the plain and simple reason that the stock, when considered independent of that property, is nothing more than a valueless piece of paper. The property is the representative of the stock, the stock the representative of the property, and as things of value and interest they are the same. Hence, it must be true that an exemption of one is the exemption of the other, for they are for the purposes of taxation the same thing. When, therefore, there is a plain and simple declaration by the Legislature that the capital stock of a company shall be exempt, and nothing more is said, that is an end of the question. Here, however, the general rule cannot operate, because the Legislature has plainly declared otherwise. It has said that while the capital stock shall *be forever* exempt, yet, that all the property of the road shall be exempt for thirty-five years after completion. The necessary inference from this is, that after thirty-five years have expired this property may be taxed. The exemption, then, ceases under the letter of the law. This section must be given a consistent construction. It is contrary to the elementary rules controlling statutory construction to give one clause of a section a construction not consistent with the clearly expressed meaning of another, when the first can be construed in harmony with the last. The Legislature here was prescribing a rule of taxation and not its rate. The effect of the section is to prohibit taxation of the stock as stock of the company; to forever prohibit the application of such a rule; but after the expiration of thirty-five years the property might be taxed by some other rule than by taxing its stock. Besides it is far from clear that because this property of the P. & G. Railroad Company is exempt on account of a stock exemption of that company, that an exemption incident to

the stock of the P. & G. Company would enure to the benefit of the A. & G. Company, because the property it acquired was exempt, not as property of the P. & G. Company strictly, but because its stock was not taxed. This exemption was incident to this property only, because the stock of the P. & G. Company was not taxed. It was a special privilege attached to the stock of that corporation. The exemption was an incident of the stock interest of that particular company in that precise property, and because, in point of fact and law, this property appertained to stock in that particular company. It would seem, therefore, that wherever you could tax this property without taxing the stock of the P. & G. Company, it might be done. But however this may be, it is apparent that it was not the purpose to exempt the property owned by this company forever, when it declared its stock exempt for that time, but that the purpose was to require the Legislature to adopt some other rule of taxation. The term "roads" in this section refers strictly to the lines of road for the construction of which the internal improvement fund was created, and this line of road, a branch road from Live Oak to Lawton, was not embraced therein. To extend the exemption to other roads would be clearly inconsistent with the general purpose of the act, which was to encourage the system created by it, in which system the branch road was not embraced.

This disposes of the first aspect in which this question has been discussed, and we now reach the second view presented of it. It is claimed that this line of road was exempt from the tax here levied by virtue of the 16th section of the act incorporating the P. & G. Railroad Company; that under this section this road was exempt from such taxation when sold by the P. & G. Company to the A. & G. Company. If such was the case, then it is still exempt, if the original exemption was a contract beyond the control of subsequent action by the Convention and Legislature.

The 16th section of the act incorporating the P. & G.

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Railroad Company provided "that the said railroad and its appurtenances and all property therewith connected, shall not be taxed higher than one-half of one per cent. upon its annual net income." Whether the original charter authorized the construction of this branch road, we deem it entirely immaterial to inquire, as the act approved January 15, 1859, amending the charter of the Pensacola and Georgia Company, gave this express authority, and it is sufficient for the purposes of this case to say that this amendment did authorize the construction of this road. Upon the adoption of this amendment, the road thereby authorized to be constructed became subject to the provisions of the original charter as to its management, control, operation and everything else. The original charter, as amended by this act, became the measure and source of the legal rights of this corporation, and this new road thus authorized to be constructed became its property, equally exempt from taxation as any other property acquired and owned before the amendment became operative. The highest tax, therefore, which can be levied, as to this road, in the hands of the Atlantic and Gulf Company, is a tax of one-half of one per cent. upon the annual net income derived therefrom. The tax here levied and proposed to be collected is an *ad valorem* tax upon the entire property, and, if it is higher than one-half of one per cent. upon the annual net income derived from the property, it is unauthorized, unless this original exemption in the charter was a privilege granted, which could be withdrawn, instead of a contract of effective obligation upon the State. In *Wilmington Railroad vs. Reed*, 13 Wall., 264, it is held by the Supreme Court of the United States that a charter to a railroad company, containing such an exemption as is here expressed, is a contract, and a law subsequently passed, laying a tax inconsistent with the exemption, violates the obligation of the contract, and is void. The same rule applies to the act of a constitutional convention impairing the obligation of a contract. Such action is void. Whatever doubt

may have once existed on this question, it is now settled by the repeated decision of the Supreme Court of the United States to the effect stated, and it would be a useless expenditure of words to discuss the matter here. We think this case comes clearly within the decision in 13 Wall., 264.

I will, however, say for myself, that as an original proposition, I would not hesitate to decide that the right to tax any particular piece of property cannot be made the subject of a perpetual exemption, binding as a contract, by one Legislature as against the power of a subsequent one. There are, in my judgment, many entirely satisfactory reasons why it cannot be. The essential elements of sovereignty necessary to the perpetuation of government cannot be made the subject of a permanent grant by the Legislature. If there is power to exempt one piece of property from taxation forever, there is power to exempt all, and the existence of this power to this extent involves the destruction of the State. If there is any limitation upon the power, it must be an entire limitation resulting from the nature of the subject. This matter is, however, no longer an open question. Judicial officers of a State must follow the repeated expression of opinion by the Supreme Court of the United States as to what is the obligation of a contract and what constitutes a contract within the meaning of the Constitution of the United States.

The position was taken in argument, that the grant of the franchises and rights to the Pensacola and Georgia Railroad Company, made by the Legislature, was in conflict with the Constitution operative at that time, (1853,) and hence that no right passed to the Atlantic and Gulf Railroad Company. That Constitution provided that no act of incorporation granting exclusive privileges should be granted for a longer period than twenty years. Even admitting that the act incorporating the Pensacola and Georgia Railroad Company was an act granting exclusive privileges within the meaning of this clause, (a question which we do not decide,) we can-

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not see how this clause of that Constitution is a limitation upon the power of the Legislature of 1866, which granted these rights to the Atlantic and Gulf Railroad Company. In 1866, another and different Constitution limited the power of the Legislature. At that date, (1866,) the twenty years during which the Pensacola and Georgia Railroad Company were to possess these rights had not expired. The right of exemption was then existing in the Pensacola and Georgia Railroad Company. In that year, the Legislature authorized the sale of this property to the Atlantic and Gulf Company, with the then existing rights of the Pensacola and Georgia Railroad Company; and, for the purpose of operating this road, the act made that company a body politic and corporate in this State. The existence of the right of exemption in this company is co-existent with its right to exercise corporate powers, and it cannot be claimed that this right has expired by virtue of any limitation in the Constitution operative in 1866, as the limitation therein contained was twenty years. The Atlantic and Gulf Company did not derive its right to exercise corporate powers as to this road through the Pensacola and Georgia Railroad Company. That right is the result of an express grant by the sovereign to it. The nature and kind of rights other than the right to be a corporation, which it acquired by the purchase, were to be ascertained by reference to the rights then existing in the Pensacola and Georgia Railroad Company, but the limit in time, as to their exercise, must be found in the charter of the Atlantic and Gulf Company, or in the Constitution then operative.

We have thus disposed of the questions in this case, so far as they involve the essential merits of this controversy. Our conclusion is, that any tax higher than one-half of one per cent. upon the annual net income derived from this property cannot be sanctioned. This conclusion, however, does not authorize an entire reversal of the judgment of the Circuit Court upon this demurrer. The plaintiff nowhere alleges

in its bill that the tax here levied *is more than one-half of one per cent. upon the annual net income derived as stated.* If the tax here levied *is not higher than this sum*, then it is authorized, and neither the Circuit Court nor this court can presume the existence of a fact not alleged in the bill. No perpetual injunction should be awarded except upon full proof that the tax levied is in excess of the limitation fixed by law, and the burden of proof, as to this fact, is upon the company, it being a fact peculiarly within its knowledge. In addition to this, if the proofs disclose any tax as due, it will be a question whether the court should award a perpetual injunction as to the whole, or only as to the excess, or whether it will require the road to do equity before the equity which it asks will be granted. This question, however, is not involved upon this demurrer, and upon it we express no opinion.

The judgment upon the demurrer is affirmed, in so far as the demurrer is sustained, and it is reversed, in so far as it directs the bill to be dismissed. The case will be remanded, with directions to enter judgment sustaining the demurrer, with leave to amend upon the payment of all costs in the Circuit Court up to the date of the motion to amend; and there will be judgment in this court against the appellant for all costs of this court.

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WILLIAM EDWARDS, APPELLANT, VS. B. C. DRAKE, ET AL.,
RESPONDENTS.

A demurrer to an answer in chancery is a pleading unknown to chancery practice. After answer the plaintiff must either set the case down for hearing upon bill and answer, except to the answer, or file a replication thereto. This court cannot give effect to such irregularity, and, upon appeal, the judgment must be reversed and the case remanded, with directions to strike the demurrer from the files.

Appeal from the Circuit Court of Alachua county.

Thomas F. King for Appellant.

Dawkins and Taylor for Respondents.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal in chancery from a judgment sustaining a demurrer to the answer of defendant, William Edwards. No such pleading as a demurrer to an answer in chancery is known to the practice in this State. After answer the next step is to except for insufficiency or impertinence, to set the cause down for hearing upon bill and answer, or to file replication. While there was no objection by defendant to the filing of this demurrer by plaintiff, and while the defendant went to a hearing upon the demurrer, without objection, still this court cannot sanction a totally unauthorized practice. We cannot determine what is the legal effect of an unauthorized pleading, because the law gives it none, and the judgment based upon it can only be reversed. It is an irregularity necessarily resulting in a reversal of the judgment.

The judgment is reversed, and the case is remanded, with directions to strike the demurrer from the files, and for such further proceedings as are not inconsistent with this opinion and conformable to law.

J. E. A. DAVIDSON, ET AL., APPELLANTS, VS. M. B. FLOYD,
APPELLEE.

1. A County Judge, as Judge of Probate, has no authority to issue an execution for costs and fees, except upon a judgment or order establishing the liability of the party and the amount due.
2. A bill in equity for an injunction will not lie for a mere trespass or wrongful withholding of chattels levied on by a sheriff under a void execution, the remedy being entirely adequate by a suit at law.

Appeal from the Circuit Court of Gadsden county.

Stephens & Love for Appellants.

This is an appeal from the Circuit Court of Gadsden, in the second Judicial Circuit. The appellant, as Judge of Probate, having issued execution against appellee for costs accruing under his petition to have an administrator appointed upon the estate of R. F. Stubbs, deceased, and, by virtue of said execution, the sheriff of Gadsden county having levied upon the property of appellee to satisfy the same, he filed his bill in chancery to restrain the parties from further proceedings and vacating the same, which was accordingly done.

It is contended on the part of the appellant that the court below, sitting as a Court of Chancery, had no jurisdiction of the subject-matter, the appellee having plain, adequate and complete remedy without resorting to a court of chancery. The appellee had his remedy under the statute. 4 Hen. and Mun., page 423; Thompson's Digest, page 360, Sec. 6.

There was no irregularity in the execution, courts of probate, in this State, being fully authorized to issue execution for costs accruing in their courts. Acts of 1848, page 29, Chapter 157, Section 5.

A court of equity will not enjoin a judgment and execution on the ground that there were errors and irregularities in the proceedings anterior to judgment, the correction being

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the proper subject of motion or writ of error. 13 Fla., page 288; 1 A. K. Mar., page 554; English C. L. Reports, Vol. 49, 525.

John W. Malone for Appellee.

The appellants insist that the decree should be reversed because—

1. Defendants' demurrer to complainant's bill should have been sustained and the bill dismissed.
2. The statements in the bill did not entitle complainant to the relief granted under the decree.
3. The subject-matter was not properly cognizable in a court of chancery, and not within its jurisdiction.

The respondent, in his bill, alleges, among other things, that J. E. A. Davidson, as County Judge of Gadsden county, an *ex-officio* Judge of Probate, issued an execution against him without authority of law and caused the same to be levied upon his certain mare, named Fannie, to enforce the collection of certain probate fees due by one C. L. Williams as sheriff and *ex-officio* administrator of R. F. Stubbs, deceased; that respondent is in no way liable for the payment of said fees; that appellants are proceeding to sell said property under said execution, and the respondent is without adequate and complete remedy at law. Appellants, by their demurrer, admit these allegations to be true, and thus raise the question: whether the case made in the bill is one proper for the intervention of a court of equity.

Appellants insist in their brief that respondent had a plain, adequate and complete remedy under our statute. Thompson's Digest, page 360, Section 6.

We deny that this statute affords the respondent any such remedy for the important reason that under the terms prescribed by the statute, the issue of illegality would necessarily come up for trial before J. E. A. Davidson as County Judge and *ex-officio* Judge of Probate, who is directly interested in the result of the suit, and who, in consequence of

his interest, is, by the wisdom of the law, disqualified from trying the suit. Chapter 1327, Laws of Florida 1862, page 13; 12 Florida Reports, 138.

It is true that judges of probate are empowered by statute to issue executions for costs accruing in their courts. Chapter 157, Laws 1848, Section 5.

But the execution must be issued against the party who is liable for the costs, and not against one who is not liable for them. This statute certainly does not confer upon judges of probate the power to issue an execution against A., and thus force him to pay costs due by B. The statute is in derogation of common law, and should be construed strictly.

The execution in question, as evidenced by the bill, exhibits and proofs, was issued by J. E. A. Davidson as County Judge and *ex-officio* Judge of Probate against respondent, in order to force him to pay a bill of costs due by one C. L. Williams as administrator of R. F. Stubbs, deceased; and therefore we contend that it was issued without authority of law, and is illegal and void, and that the property of respondent was illegally taken in execution. And courts of equity will restrain the sale of property illegally taken in execution. 2 R. I., 67.

RANDALL, C. J., delivered the opinion of the court.

The appellant was the County Judge of Gadsden county. Appellee, in 1869, filed a petition with the county judge stating the death of one Stubbs, requesting the issuing of letters of administration to the sheriff, and the judge granted the petition. The administrator, for some reason, neglected to take possession of the property of the estate of Stubbs. The judge demanded payment of his fees, amounting to some eleven dollars, from the appellee, and such fees being unpaid, the judge, on the 15th April, 1875, issued an execution for the amount and interest, amounting, in all, to some sixteen dollars, under which the sheriff levied on one black mare, the property of appellee, and advertised her for sale.

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The appellee now files his bill in equity, claiming that the costs were not legally chargeable to him, that the execution was illegally issued, and praying that an injunction be issued restraining the sale, and that the property be returned to him. A copy of the execution is annexed as an exhibit, and also a copy of an account for the costs in question rendered by the judge, in which the costs are charged against the administrator.

The appellant answers the bill, insisting that the amount for fees and costs was properly chargeable to complainant, and that the execution was issued according to law.

After the taking of testimony and a hearing, an injunction was decreed enjoining the sale and all further proceedings under the execution.

There is no pretence in the pleadings that any judgment or order of the county judge was ever entered against the appellee, or that his liability to pay the costs in question was established in any manner, and the execution, upon its face, showed that there was no such judgment.

While it is true that judges of probate are authorized to issue executions for costs which may accrue in their courts, (Chapter 157, Laws of 1847,) yet it is necessary, before such writ can issue, that some judicial judgment or order, establishing the liability of parties and the amount due, should be made according to the ordinary practice of courts. It was not contemplated that an execution might be issued against parties whose liability to pay was not so established, and who had no opportunity to contest the liability as well as the amount of such indebtedness claimed.

But though the execution in this case was improperly issued and levied, it does not follow that it is a proper case for the exercise of chancery jurisdiction. The levy was made upon a mare, and the owner has a complete and adequate remedy at law for the wrongful seizure. It is only in cases where the chattel is of such peculiar quality that the remedy at law by damages would be utterly inadequate and leave the

party in a state of irremediable loss, that a court of equity will interfere; as, where the thing is of peculiar value, as being ancient, or the production of some distinguished artist, or a family relic or ornament. (2 Story's Eq. Jur., Section 709, and cases cited; Fells vs. Read, 3 Ves. Jr., 70; Bryan vs. Long, 14 Fla., 366; McCollum vs. Morrison, 14 Fla., 414; Bowes vs. Hoeg, 15 Fla., 403.)

If the sheriff who made the levy in this case was a trespasser, or holds the property without lawful authority, an action of trespass, trover or other appropriate action at law will afford adequate remedy for the wrong. There is no ground shown in this case for the interposition of the extraordinary powers of the court of chancery.

The decree is reversed, and the cause remanded, with directions to dismiss the bill.

J. E. A. DAVIDSON, JUDGE OF COUNTY COURT, ET AL., APPELLANTS, VS. HESTER B. SEEGAR, ADMINISTRATRIX, ETC., APPELLEE.

1. Chapter 1752 of the Laws of 1870, providing that the Judges of County Courts shall be paid three dollars for each case docketed in their courts, is not repealed by either Chapter 1815 of the Laws of 1870 or by Chapter 1981 of the Laws of 1874.
2. An execution is a writ grounded on the judgment of a competent court, and cannot issue except upon an order, decree or judgment of such court, wherein the liability of the party is established.
3. The sale by a Sheriff of real property, by virtue of an execution unauthorized by law, and void upon its face, would not cast a cloud upon the title, and a Court of Equity will not interfere to restrain such sale, the law affording complete and ample redress.
4. Where an action cannot be sustained upon a conveyance, in the absence of rebutting proof, it cannot be said to be a cloud upon the title.

Davidson et al. v. Seegar.

Appeal from the Circuit Court of Gadsden county.

On the 13th day of May, 1875, Hester B. Seegar, administratrix of, &c., of John F. Seegar, deceased, filed her bill of complaint against J. E. A. Davidson, Judge of the County Court in and for Gadsden county, and R. S. Tucker, Sheriff of said county of Gadsden. In such bill of complaint she alleges that about the 17th day of March, 1874, she commenced her suit in the County Court of Gadsden county against one James H. Sylvester, and at the May term of said court, in the same year, she recovered a judgment against the said Sylvester, in said action, for the sum of one hundred and nineteen dollars and seventy-five cents, for damages and costs; that the said J. E. A. Davidson demanded of her the sum of three dollars as a docket fee, which he claimed was due him because such suit was docketed in said County Court; that she refused to pay him the said three dollars; that thereupon the said Davidson, Judge as aforesaid, caused T. S. Stearns, the Clerk of Gadsden county, to issue an execution on the 26th day of April, A. D. 1875, directed to all and singular the Sheriffs of the State of Florida, commanding them that of the goods and chattels, lands and tenements of the said Hester B. Seegar, they cause to be made the sum of three dollars, the same being for costs (docket fees) of J. E. A. Davidson, Judge of the County Court of Gadsden county, in the suit of the said Hester B. Seegar, as administratrix, plaintiff, against the defendant in said suit, James H. Sylvester.

That the defendant, R. S. Tucker, as Sheriff of Gadsden county, by virtue of the said execution, levied upon 484 acres of land, in the county of Gadsden, being assets in the possession of Hester B. Seegar, as administratrix of, &c., of John F. Seegar, deceased, and had advertised the same for sale to satisfy the execution; that the sum of three dollars which the said Judge, J. E. A. Davidson, requires her to pay as a docket fee, is unauthorized by law and is illegal,

and that if she were to pay the same she would make herself liable for that amount to the creditors and distributees of the estate of the said John F. Seegar, deceased, for a waste of the estate; that the issuing of the execution is unauthorized by law, and is illegal and absolutely void.

She prays an injunction against J. E. A. Davidson, Judge as aforesaid, and R. S. Tucker, Sheriff as aforesaid, enjoining and restraining them, their agents and attorneys, from proceeding to sell the real estate so levied upon, under or by virtue of the execution.

On the 18th day of May, 1875, J.E.A. Davidson, as Judge of the County Court, one of the defendants, demurred to the bill of complaint, upon the ground that the bill contains no matter of equity whereon the court can ground any decree or give the complainant any relief or assistance as against him.

On the third day of June the demurrer was overruled by the court, and a writ of injunction was issued in compliance with the prayer of the bill.

The defendant, J. E. A. Davidson, then answers the bill of complaint, admitting having caused the execution to issue, and that the same had been levied by the Sheriff, as the facts are charged in the complainant's bill, but denies that the said sum of three dollars, for which said execution issued, was unauthorized by law and illegal, averring that it was a legitimate demand under the laws of this State. He then suggests that the complainant be remitted to her redress at common law.

To this answer the complainant files a replication.

On the 26th January, 1876, the cause came on to be heard upon the pleadings, when a decree was rendered by the court, making the injunction perpetual, enjoining the defendants from enforcing the execution, and awarding costs to the plaintiff.

On the same day an injunction was duly issued in pursuance of such decree and the defendants took their appeal.

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Stephens & Love for Appellants.

John W. Malone for Respondents.

VAN VALKENBURGH, J., delivered the opinion of the court.

The first question which arises in the examination of this case is, does the law authorize the judge of a county court to demand and receive a docket fee of three dollars from the plaintiff for each case put upon the county court docket?

The Legislature of 1870, by an act entitled "An act to amend an act entitled an act for the pay of State Attorneys and County Judges, approved February 1, 1869," (Chapter 1752, in Section 2,) provides as follows:

"The judges of the county courts of the State of Florida shall be paid five dollars per day for each day of any term of the court, when not sitting as a court of probate, and three dollars for each case docketed; which fees shall be taxed as other costs."

It was evidently the intention of the law-makers to give to county judges this fee for each case docketed, subject, however, to the condition that such fee should be taxed as other costs were then taxed. The complainant, in this case, claims that this law has been repealed, and the right of county judges to this docket fee of three dollars taken away by Chapter 1815 of the laws of 1870. Section 1 of this act reads as follows:

"The following tariff shall be the fees and costs of all *officers herein designated*, and hereafter it shall be unlawful for any officer to charge or collect a greater sum of money than herein authorized to be charged for the *services herein designated*, or to make any charge whatever except that in this section prescribed."

This section fixes the probate fees of county judges, but does not purport to change the docket fee for causes in the county court. The office of county judge is not designated

in that section except with reference to his fees as probate judge. His duties as county judge, presiding at the county courts held in pursuance of law, with a well defined jurisdiction, were entirely dissimilar from those of probate judge, and his pay for services rendered as county judge was fixed by another statute. It is, by the statute above cited, made unlawful for any officer *named* therein to charge or collect for services *designated therein* a greater sum of money than is fixed thereby, and they are still further prohibited from making any charges whatever except such as are therein prescribed. By the repealing section, "all laws and parts of laws conflicting with the intent and meaning of this act" are repealed. It can hardly be claimed that the law giving to county judges the "docket fee" is in conflict with this act. The right to that "docket fee" is contained in a section of the law of 1870, which, by this very act, has been changed in part, while this provision is left unaffected.

We cannot see how this act takes from the county judge his right to charge for and receive this fee.

This view is further sustained by a consideration of the second section of the same act, which is as follows:

"SECTION 2. The county judges, while holding county court, shall be paid such per diem as the county commissioners shall prescribe, provided said per diem shall not exceed that now allowed by law." Had it been intended to repeal the law providing for the docket fee, such repeal would have been made by a proper change of this section, so as to have made that intent plain and intelligible, or it would have been specifically made in the first section by reference to the fees of county judges. As it is, this section simply gives to county commissioners the right to regulate the amount of the *per diem* in their respective counties, provided that it should not exceed the sum allowed by law.

By Chapter 1981 of the laws of 1874, a new fee bill was enacted, the first section being in these words:

"SECTION 1. That the following tariff shall be the costs

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and fees of all *officers herein designated*, and hereafter it shall be unlawful for any officer to collect and charge a greater sum of money than herein designated and authorized to be charged for services hereinafter designated."

In this statute the only reference to the payment of the county judge as county judge is in the fourth section, by which his *per diem* for each day's service while holding court is fixed at five dollars, to be paid out of the county treasury, thus repealing the second section of the law of 1870 above referred to. "The probate fees of the judges of the county courts" are specifically named and fixed as they are in the law of 1870. The repealing section of this law reaches only "all laws heretofore enacted fixing and establishing fees and per diem for the officers for services or duties *named herein*, and all laws and parts of laws inconsistent with or conflicting with the provisions of this act." We cannot see that either of these statutes repeals the first above cited law of 1870, and that by the terms of that act the county judge is entitled to his fee of three dollars for each case docketed in the county court.

The next question which arises, it having been settled that the judge of the county court was entitled to his docket fee of three dollars, is, could such judge cause an execution to be issued by the clerk of his court against the plaintiff in the action so docketed for the collection of such docket fee?

An execution is a writ grounded on the judgment of the court from whence it issues and is supposed to be granted by the court at the request of the party at whose suit it is issued to give him satisfaction on the judgment which he has obtained. We know of no law which authorizes the issuing of an execution unless there be an order, decree or judgment of a court upon which such writ must be based. In this case the record disclosed no such order, decree or judgment upon which the writ was issued. The bill of complaint alleges that "J. E. A. Davidson, judge as aforesaid, demanded of your oratrix the sum of three dollars as a docket fee, which he

claimed was due him, because said suit was docketed in said county court, but your oratrix refused to pay to him said three dollars, as she was advised that the same was not a legal and proper charge against her; and, thereupon, the said J. E. A. Davidson, judge as aforesaid, caused T. S. Stearns, the clerk of Gadsden county, to issue an execution on the 26th day of April, A. D. 1875, directed to all and singular the sheriffs of the State of Florida, commanding them that of the goods and chattels, lands and tenements of your oratrix they cause to be made the sum of three dollars, the same being for costs (docket fee) of J. E. A. Davidson, Judge of the County Court for Gadsden county, in the suit of your oratrix as administratrix as aforesaid, plaintiff, against the said James H. Sylvester, defendant." This allegation is admitted by the appellant in his answer, and the execution appears to have been issued, not upon any order or judgment of a competent court, but upon a demand for three dollars, docket fee, allowed by law to the judge of the county court. The judge might have demanded a prepayment of said fee, provided it would not have amounted to a prevention of justice, of which there is no suggestion. Chapter 1752, Laws of 1870, Section 2.

The statute again provides that "when a bill of costs shall be taxed by the clerk and approved of by the judge of the court wherein the services have been rendered, it shall have the force and effect of an execution, and shall be collected by the sheriff as in other cases of execution, and it shall not be necessary to issue execution therefor." Thomp. Dig., 429.

If this docket fee had been included in the costs of the plaintiff arising in the progress of the action, taxed by the clerk and approved by the judge, it might have had, under this law, the force and effect of an execution in the hands of the sheriff. As this case appears upon the record, the judge had a demand against the complainant for his docket fee, which he could have enforced by proper proceedings in a court at law. No such proceedings have been had, and no

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judgment has been entered or even sought for on the demand.

The appellant demurred to the bill of complaint, insisting that the court of chancery had no jurisdiction of the subject-matter, the appellee having an adequate and complete remedy at law.

The execution issued by the clerk of Gadsden county, by the direction of the appellant, was put into the hands of the sheriff of the same county, and by him levied upon four hundred and eighty-four acres of land. Such sheriff has advertised such land for sale at public auction by virtue of the said execution, and the appellee prays an injunction to stay such sale and the enforcement of said execution. Upon the simple statement of this proposition, it would seem that the court had jurisdiction, and that the complainant below had sought her proper remedy. This, however, depends, first, upon the question whether the execution was good upon its face, and would be a justification to the officer executing it by the levy and sale; and, second, whether the sale of the real estate, by virtue of such execution, would throw a cloud upon the title claimed by the appellee. We have already seen that the execution was not authorized by law, not being founded upon any order, decree or judgment of any competent court. If not authorized by law, and it was sufficient upon its face in form, teste, &c., to justify its execution by the sheriff, it would be voidable and subject to be set aside or vacated; but it does not purport to be issued upon a judgment of any court. It directs the sheriff "of the goods and chattels, lands and tenements of your oratrix (the appellee) they cause to be made the sum of three dollars, the same being for costs (docket fee) of J. E. A. Davidson, Judge of the County Court for Gadsden county, in the suit of," &c. This cannot be considered a writ of execution, issued in due form of law, and amounting to a protection to the officer acting under it. It purports to be issued "for costs, docket fee," naming no plaintiff, no judgment, showing upon its face its entire want of authority, and is, therefore, void.

Would a sale of real estate, by virtue of such an execution, cast a cloud upon the title of the appellee owning the same?

The purchaser at any such sale, in order to recover the possession in an action, must show a paramount title and right of entry under it. To effect this, the execution upon which the sale was made must be produced in evidence. *Hartley vs. Ferrell*, 9 Fla., 374.

This execution being illegal and void upon its face, founded upon no judgment of a competent court, would not justify the sheriff in the sale of the land, and his conveyance would create no cloud upon the title of the appellee.

In the case of *Pixley vs. Huggins*, (15 California, 127,) the Supreme Court of California lays down, as we believe, the true rule in all such cases:

"The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court, as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail."

When an action cannot be sustained upon a conveyance in the absence of rebutting proof, it cannot be said to be a cloud upon the title. *Van Doren vs. Mayor of New York*, 9 Paige, 388; *Wiggin vs. Mayor of New York*, 9 Paige, 23; *Livingston vs. Hollonbeck*, 4 Barber, S. C., 16; *Overing vs. Foote*, 43 New York, 290; *Meloy vs. Dougherty*, 16 Wisconsin, 287; *Fonda vs. Sage*, 48 New York, 173.

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The case of Budd vs. Long, 13 Fla., 288, establishes no principle in conflict with this opinion.

The decree must be reversed and the cause remanded, with instructions that the bill be dismissed for want of equity.

WESTCOTT, J., concurring.

I concur in the judgment rendered in this case. I cannot, however, agree with the court in the conclusion that Chapter 1752 of the Laws of Florida, in so far as it authorizes a docket fee to the county judge, is not repealed by Chapter 1981, Laws of Florida. The title of the act last named (Chapter 1981) is "an act to fix and regulate the fees and per diem of certain officers herein designated." The title of an act is, under the Constitution of this State, a part of the law, and we must look to it in part to determine the general purpose of the Legislature. (Cool. Con. Lim., 3d Ed., 141 to 151.) The county judge is an "officer designated" in the fourth section of this act, and the purpose and intent of the act was clearly to fix and regulate *all the compensation* of the officers named, whether that compensation consisted of fees or per diem, or both. This being so, the next question is, did the Legislature carry this, their clear intention, into effect? The first section of this act provides "that the *following tariff shall be the costs and fees of all officers herein designated*, and hereafter it shall be unlawful for any officer to collect and charge a greater sum of money than herein designated and authorized to be charged for services hereinafter designated."

The Legislature, in enacting "that the following tariff," by which is meant list, "shall be the costs and fees of all officers herein designated," established a list embracing all costs or fees which such officers could charge. I do not see how it is possible to escape this conclusion, if we construe this section with reference to the title. It certainly was not necessary that the Legislature should go further and in negative words enact that no other charges than those designa-

ted in the act should be made by those officers. The affirmative declaration, to the effect that the fees and *per diem* of all officers designated in the act shall be the costs and fees in the tariff prescribed, is sufficient. No negative words are necessary.

The other clause of the section prohibits the officer from charging more for services designated in the list or tariff than the amount there fixed. The effect of the section is, therefore, first, to fix a list of all the fees or *per diem* which these officers can charge, and then prohibits a higher charge than those allowed for such services, thus accomplishing the object expressed in the title, which is "*to fix*" the fees and *per diem* of the officers designated in the act. This act is a revision of the several acts upon the subject of the fees and *per diem* of the officers named, and it is sufficient in such cases if the acts as revised are re-enacted in the act revising in full and at length, giving the whole law as revised. (Cool. Con. Lim., 151, 3d Ed.) Any law inconsistent with this revising act is repealed by the letter of the 15th section of this act, and any law giving other costs or fees than as prescribed therein is inconsistent with its provisions, as its purpose and effect is to limit the officers to the fees named. The acts here revised are repealed, in so far as they fix fees for the officers named, by the letter of the revising statute as well as by clear implication. If this is not so, the effect of the statute is only to give fees to all the officers therein named in addition to those before allowed by law. This certainly was not the purpose of the Legislature, and I think it is not its act.

Mattair and others v. Payne and others.

HENRY L. MATTAIR AND OTHERS, APPELLANTS, VS. CELIA B.
PAYNE AND OTHERS, APPELLEES.

1. When a bill of complaint contains such a variety of subjects of litigation not proper to be joined, and of parties not properly joined, and as to some of the matters other parties are necessary, the court may, *sua sponte*, dismiss the bill as multifarious, whether the bill be or be not demurred to for such causes.
2. A bill in equity to set aside a deed or mortgage cannot be sustained without the presence of the grantee or mortgagee; and with such matters cannot be joined a demand for rents and profits.
3. A demand for rents and profits, or for use and occupation, cannot be recovered in a suit in equity for a partition.
4. A decree of partition cannot be had while the premises are held adversely by other parties. The legal title must be first established.
5. Equity is not the proper forum nor a bill in partition the proper action for trying the legal title to lands.

Appeal from the Circuit Court of Nassau county.

John Friend for Appellants.

Cooper & Ledwith for Appellees.

RANDALL, C. J., delivered the opinion of the court.

The purposes of this suit, as appears from the bill of complaint, are as follows:

1. To recover from the defendants for the use and occupation of a certain hotel property in Fernandina from February, 1866; second, to set aside a deed executed by Emeline Coy, Amelia Crichton and others, complainants, to John M. Payne upon a general allegation of fraud, and also because of the imperfect execution of the deed, the said John M. Payne, (defendants' grantor,) not being made a party to the suit; third, to set aside the conveyance by John M. Payne to the defendants; fourth, to enjoin the defendants from ever setting up any title or interest in the premises under said conveyance; fifth, to set aside a mortgage executed

by Amaziah Coy, deceased, (from whom complainants derive title,) to Joseph Finegan, (without making Finegan a party to the suit;) sixth, to procure a sale by a master or commissioner of the premises; seventh, for a distribution of the proceeds of the sale and of the rents and profits among the complainants as heirs-at-law and the widow of said Amaziah Coy, deceased.

The deed of Emeline Coy, the widow, and Amelia Crichton and Caroline Dupray, was made for the consideration of ten thousand dollars and purported to convey the entire property in fee simple, with full covenants of warranty, to John M. Payne, who paid \$5,510 in cash, and gave a mortgage for \$4,490, the business being transacted through Joseph Finegan, the mortgagee, under which deed Payne went into possession. John M. Payne conveyed to defendants in April, 1871, since which time they have been in possession. Henry L. Mattair and three others, the children of a daughter of A. Coy, deceased, claim an interest as heirs-at-law not affected by the conveyances.

The defendants claim to be *bona fide* purchasers without notice and for a valuable consideration. They allege that Mrs. Emeline Coy is the widow and administratrix of A. Coy, deceased; that there are large debts unpaid against the estate; that she has not fully administered; that the property in question was the only property of the deceased, and various other matters; and claim that there can be no partition and distribution of the property among the heirs until the final settlement of said estate. They further say that the \$5,510 paid by John M. Payne was used in paying debts of the deceased. Defendants also demurred to the bill for multifariousness and other causes.

It is difficult to determine from the bill of complaint the precise status, legal or equitable, of the parties or the property. As to the question of fraud, there is a mere general allegation not supported by any facts, but negatived by the alleged facts.

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The several matters grouped together in the bill are so incompatible and multifarious, that no other decree can be made upon the whole case in justice to all parties except to dismiss the bill without prejudice, in order that the several interests of the various parties may be protected.

The demand for an accounting of rents and profits; for setting aside deeds and mortgages; determining the rights of persons not parties; for adjusting legal titles and equitable titles; for the possession of lands; for a sale and partition of the proceeds of lands held adversely to the defendants, cannot be adjusted in one proceeding at law or in equity.

As appears from the bill, some of the complainants have a legal interest in the property as the heirs of Amaziah Coy, and some of them have parted with their interests, and the defendants, the grantees of John M. Payne, have become invested with an interest and are in possession, holding adversely to the complainants. We do not mean by this to determine what are the rights of any of these parties farther than that this is what may be gathered from the allegations in the pleadings.

It was insisted by the defendants that something in the case of Coy vs. Downie (14 Fla., 544) adjudicated some of the questions involved here as to the title. This is an error. That suit was brought to foreclose the mortgage given by John M. Payne, and the facts stated in the pleadings were commented upon with reference to the right to foreclose. There was no issue in the case upon which any judgment could be given determining the title of these parties. In the case referred to, the court assumed what was asserted by both parties to be a fact. The judgment given affected that suit only, upon the facts then and there stated.

Treating this suit as an action to recover rents and profits even with proper parties, it is suggested that an action of ejectment for the recovery of the possession would be the more proper form, if the complainants have good title and right of possession.

Treated as a suit in partition, it cannot be maintained with these parties and with the legal interests involved in such conflict as here presented, and with the adverse possession of these defendants as against the plaintiff collectively as they appear from the bill of complaint. (Burhans vs. Burhans, 2 Barb. Ch. R. 398; Manners vs. Manners, 1 Green's Ch. R., (N. J.,) 384; Wilkin vs. Wilkin, 1 Johns. Ch. 111; Phelps vs. Green, 3 Johns. Ch. 302; Clapp vs. Bromagham, 9 Cowen, 530; Cartwright vs. Pultney, 2 Atk., 380; Blyman vs. Brown, 2 Vernon, 232.)

As a bill for partition, it is improvidently brought, if the fact be, as alleged in the answer, that Mrs. Coy is the administratrix of Amaziah Coy, deceased, that the property in question constitutes the assets of the estate, that there are debts remaining unsettled against it and it is unadministered.

As a bill to set aside conveyances for fraud, it improperly includes a demand of rents and profits, and is bad for want of proper parties as well as for the joinder of improper parties.

With all the facts stated in the bill and answer, the estate of A. Coy, deceased, being unsettled, the title of his heirs is only *sub modo*; the rights of the widow and the heirs, subject also to the mortgage to Finegan according to the bill, a sale under proceedings for partition would be productive of little benefit to any of the parties.

There are other matters which it would seem from the facts stated should be settled before partition, as the rights of John M. Payne under his purchase with reference to the Finegan mortgage, if it be true that the \$5,510 paid by him was used in paying that mortgage and the other debts of the estate; and what rights enured to John M. Payne under the imperfect deed, and whether, if the deed to him conveyed no estate of the grantors, he has any right to be subrogated to the rights of Finegan under his mortgage, Payne's money having been applied to that mortgage.

Board Public Instruction Nassau County v. Billings.

There seems to be no better way to put these parties in their proper position to assert their legal and equitable remedies and disentangle them from the labyrinth of confusion in which they appear to be involved, than to dismiss the whole proceeding. This is sanctioned by Story's Eq. Pleadings, Section 271, and cases cited, whether the bill be demurred to or not.

The decree dismissing the bill is affirmed, with the modification, however, that the order of dismissal should be without prejudice to the complainants, or either of them, as to future proceedings.

THE BOARD OF PUBLIC INSTRUCTION FOR NASSAU COUNTY,
APPELLANT, VS. LIBERTY BILLINGS, APPELLEE.

The County Superintendent of Schools has no authority to purchase and pay for lands for school purposes without being authorized by the County Board of Instruction, and money paid by the Treasurer upon the order of the Superintendent for land purchased without such authority may be recovered by the County Board as a corporation, in an action for money had and received.

Appeal from Circuit Court of Nassau county.

Friend & Hammond for Appellants.

Billings for Appellee.

RANDALL, C. J., delivered the opinion of the court.

This is an action of assumpsit commenced by appellant for money had and received by appellee. The declaration contains but one count, setting forth that the appellee bargained with the County Superintendent of Nassau county for the sale and conveyance to the plaintiff of certain lots

of land for the price of \$700, and the appellee executed and delivered to the Superintendent a deed of the lots, and received from him an order on the Treasurer of the County Board for that sum, which was thereupon paid to the appellee by the Treasurer; that the contract for said lots was without the authority of the plaintiffs; the payment was without their consent; they repudiated the acts of the Superintendent as soon as they discovered the payment, refused to receive the deed, and demanded the return of the money, which the appellee refused. The plaintiffs have further inserted in the body of the declaration the statement that the defendant had not a title in fee of the premises, and could not deliver the title and seisin according to the covenants in the deed. This is an unnecessary recital of a fact not material to the proper and complete statement of a cause of action for money had and received. The declaration is complete without it, and this recital is surplusage.

The defendant demurs to the declaration, assuming that the action should be upon the covenants in the deed, and the court gave judgment sustaining the demurrer.

By the statute, (Acts of 1869, Chapter 1686, Sections 14 to 19 inclusive), the Board of Public Instruction of the county is a body corporate, and is authorized to purchase and hold real estate for school-house sites, &c., and to manage and control the school moneys of the county; and the County Superintendent of Schools is made the Secretary and Agent of the Board. (Sec. 17).

The Superintendent has no authority to contract for the purchase of land for school purposes, without being expressly authorized by the board. The County Board of Nassau county does not appear to have conferred any authority upon the Superintendent to purchase the lots in question, or to pay for them out of the public funds.

The defendant therefore cannot hold the plaintiffs to the contract made with their Secretary and Agent until they be shown to have authorized or ratified it, and it follows that

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the money in question was wrongfully paid by the Agent of the plaintiffs, and wrongfully received by the defendant. He is therefore, upon the case made by the declaration, liable to the plaintiffs for the money so received, and the form of action chosen is appropriate.

Had the plaintiffs brought their action in covenant, they would have assumed the validity of the purchase of the lots by the Superintendent, which purchase, on the contrary, they repudiated when it was brought to their notice, and demanded the return of the money.

The judgment of the Circuit Court is reversed.

WM. D. HOLLEY, PLAINTIFF IN ERROR, VS. STATE OF
FLORIDA, DEFENDANT IN ERROR.

A party indicted for murder is entitled, upon proper application, to a writ of *habeas corpus* for the purpose of showing such facts as may satisfy the court that the proof is not strong or the presumption is not great that he is guilty of a capital offence, and that he is entitled to be discharged on bail. The indictment charging a capital offence is not conclusive upon such application, under the statute, as to the character of the testimony.

Writ of error to Circuit Court of Jackson county.

McClellan & Milton for Plaintiff in Error.

The Attorney-General, for the State, submitted the case on the authority of *Finch vs. State*, reported in this volume.

RANDALL, C. J., delivered the opinion of the court.

The plaintiff in error, indicted for murder, applied to the court for a writ of *habeas corpus* for the purpose of discharge on bail, upon the ground that he was not guilty, and

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upon the ground that the proof was not evident nor the "presumption great;" that the evidence on the part of the State was merely circumstantial and hearsay, and does not even raise a presumption of guilt; and, further, that he is an invalid and his health will be impaired by confinement in jail until the next term of the court.

The Judge refused to grant the writ substantially upon the ground that the finding of an indictment by a grand jury established the fact, for the purposes of this application, that the proof was evident and the presumption great.

At the last term of this court we held, in the case of Finch against the State, that a party indicted for murder is entitled, under the laws of this State, upon *habeas corpus*, to produce such evidence as may operate to convince the court that the offence is of such grade, or that there are such strong doubts in the case that a jury should not, upon the case as presented, convict of a capital offence, and be discharged on bail.

Of course, upon such an application, the public prosecutor should have sufficient notice of the time and place of the hearing to prepare therefor and to produce evidence. Whether in such case the public interests require the prosecutor to produce any evidence beyond the indictment, must be judged of by him and by the court, and the conclusion of the court upon the case as presented will not prejudice the State or the accused when the facts are presented to a jury.

The order of the Circuit Court is reversed, and the cause remanded with direction that the writ be granted.

The State of Florida et al., v. The Florida Central R. R. Co. et al.

THE STATE OF FLORIDA AND THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA, RESPONDENTS, VS. THE FLORIDA CENTRAL RAILROAD COMPANY, EDWARD M. L'ENGLE, ROBERT J. WASHINGTON AND FANNIE S. PAPY, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF MARIANO D. PAPY, DECEASED, APPELLANTS.

1. The simple filing of letters testamentary after a final judgment against her testator does not enable an executrix to prosecute an appeal from the judgment. She must be made a party in the court below to give her a standing as an appellant in the court.
2. A person claiming to succeed to and represent the interests of a defendant against whom a judgment has been rendered, cannot, by simply filing a statement and exhibits showing such claim, prosecute an appeal to this court in his own name, there having been no action by the court rendering the judgment making him a party. The general rule is that a person has no right to appeal until some question to which he was a party has been adjudicated by the court of original jurisdiction.
3. A plaintiff may dismiss his own bill, with costs, at any time before decree. Where the order is to discontinue at "plaintiff's costs," it is the duty of the party to whom costs are awarded to furnish his bill or procure his costs to be taxed.
4. An individual stockholder cannot prosecute an appeal from a judgment against the corporation of which he is a member.
5. All power of a private corporation must be derived from some action of the Legislative Department of the Government. In order to the execution of a mortgage bond a railroad company must have been granted such power either in express words or by reasonable and necessary implication. In fixing the power of such corporation as to the character of the contracts it may make, it is proper to regard the general scope and purpose of the grant of the Legislature, and not to disregard entirely reasonable implications resulting from attendant circumstances. Under the legislation of this State the Florida Central Railroad Company had the power to execute a bond which was to be a mortgage by virtue of the statute, and without the execution of an additional mortgage to secure it. To such bond, when executed, attached the lien, power, and duty of the State as trustee under the statute.
6. Where an act within the power of a corporation is done irregularly, a subsequent confirmation and approval of the act by the stockholders

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is sufficient to bind the corporation. A corporation having power to issue its bonds to another corporation for the purpose of enabling it to exchange them for bonds of the State, may ratify and affirm by subsequent action of its stockholders a former irregular issue and exchange of its bonds, done by officers or stockholders of the company.

7. Where a corporation is authorized to make a contract involving a trust and mortgage lien, and the statute confers a power of seizure and sale upon the trustee, the statute remedy is not exclusive. Such a statute creates rights and relations well known to equity, and its jurisdiction attaches.
8. The statutes fix the rights of the respective parties to such exchange. Under them the Florida Central Railroad Company was authorized to deliver its mortgage bonds to the Jacksonville, Pensacola and Mobile Railroad Company for the purpose of enabling the latter company, through an exchange of these bonds for State bonds, and a sale of the State bonds, to extend its line of road. The increased traffic which it was presumed would come to the Florida Central Company was the consideration for this contract. Upon an exchange of these bonds for State bonds the J. P. and M. Company cannot hold the bonds of the State as its own property, and without a sale of the bonds or an extension of the road occupy the position of a creditor of the Florida Central Company. It is not a bondholder within the meaning of the statute, or entitled to its protection.

Appeal from the Circuit Court of the Fourth Judicial Circuit for Duval county.

Justices Randall and Van Valkenburgh being disqualified, Judges Bryson and Goss, of the Third and Fifth Circuits, with Mr. Justice Westcott, heard the case. The term of Judge Goss having expired, the court was composed of Mr. Justice Westcott and Judge Bryson when the opinion was delivered.

The opinion of the court contains a statement of the case.

G. P. Raney and *E. M. L'Engle* for Appellants.

H. Bisbee, Jr., for Respondents.

WESTCOTT, J., delivered the opinion of the Court.

The appellants in this case looking to the assignment of errors and the parties named upon the calendar, are the

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Florida Central Railroad Company, Edward M. L'Engle, Fannie S. Papy, executrix of the last will and testament of Mariano D. Papy, deceased, and Robert J. Washington. We consider the appeals in the order stated.

The plaintiff, the State of Florida, has in possession one thousand bonds of one thousand dollars each, bearing the seal of the Florida Central Railroad Company, of the following tenor and date:

"No. —, \$1,000, United States of America, State of Florida. Bond of the Florida Central Railroad Company.

"Know all men by these presents, that the Florida Central Railroad Company acknowledges itself indebted to the State of Florida in the sum of one thousand dollars for value received, which sum the Florida Central Railroad Company promises and agrees to pay to the State of Florida on the first day of January A. D. nineteen hundred, in the city of New York, with interest thereon at the rate of eight per centum per annum, payable semi-annually on the first days of July and January in each year, on the presentation and delivery of the proper coupons hereunto attached." This bond is one of a series of like tenor, limited to sixteen thousand dollars per mile, issued in accordance with an act of the Legislature of the State of Florida, approved January 28th, eighteen hundred and seventy, entitled an act to alter and amend "an act entitled an act to perfect the public works of the State," approved June 24th, eighteen hundred and sixty-nine, and given in exchange for bonds issued by the State of Florida to aid the Jacksonville, Pensacola and Mobile Railroad Company to complete, equip and maintain its road for an equal amount, in accordance with said act.

"In witness whereof the said company has caused this bond to be signed and attested in its behalf by its President, and the common seal affixed at its office in —, this first day of January, in the year 1870.

"GEO. W. SWEPSON, President.

"H. H. THOMPSON, Treasurer."

To which bond is attached the coupons authorized by the statute hereinafter referred to.

This action was instituted by the State in March, 1872, to subject the property and franchises of this company to sale, the State alleging in its amended complaint, by which defendant was made a party, that the company had failed to pay any of the interest due upon the bonds. The defendant in argument denies that the allegations of the complaint set up an execution of these bonds by the company, and affirms that such allegation is necessary to sustain the decree. Without stating in detail all of the allegations in reference to this subject, scattered as they are through a complaint of twenty-eight printed pages, we will say that from a careful and accurate examination of all the statements of the complaint upon this subject, there is such an allegation, and that the complaint also states, substantially, a sale of the State bonds which were issued in exchange for the bonds of this company.

The plaintiff claims that upon this default it was lawful for the State, through the Governor, to enter upon and take possession of the property and franchises of the company, to sell the same and apply the proceeds in accordance with the provisions of the statutes under which it alleges the bonds were issued; and that this being a mortgage contract the remedy in equity attaching to such equitable relations was effective to decree a sale, and an application of the proceeds to the holders of the bonds of the State.

To this complaint the defendant in its original answer replied, not denying that the company was authorized to issue the bonds, or that they were delivered to the Governor of the State, and admitting the power of the company under the law to execute its bond; but after setting up the facts connected with the exchange, alleging that the exchange was made without its sanction or assent, the company, while not denying that it adopted these bonds as bonds of the company, alleged that when it did so *it was not aware of*

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the form of the bond, or that it was to be exchanged with the State. It alleges, as a fact known to it, that an exchange of these company bonds for State bonds was made under an agreement between Milton S. Littlefield and Edward Houstoun, who together owned a large majority of stock in the company; that the exchange was made upon the understanding that the bonds received in exchange were placed in Houstoun's hands to secure amounts due him by Littlefield for the purchase of stock in the company, and for other sums due for other securities so purchased, as well as for payment for the stock in this company owned by other parties, it being understood that when this was done the bonds of the State should be delivered to Littlefield, who was the President of the Jacksonville, Pensacola and Mobile Rail Road Company. It was further agreed between these parties thus owning nearly the entire stock of the company that Houstoun, if he so desired, might return the State bonds and receive the company bonds from the State; that the State bonds not answering the purposes of Houstoun, he did so return them, and received the company bonds in lieu thereof; that Houstoun then made a request of the directors to authorize, in lieu of the company bonds held by him, an issue of company bonds secured by a deed of trust, so that he might obtain the benefit of the aforesaid agreement between himself and Littlefield; that before this could be done two of the stockholders of this defendant filed a complaint, and obtained an injunction against the said Houstoun, restraining him from making any disposition of the bonds; that while this injunction was pending, C. B. Coddington, who was in the city of Tallahassee, in this State, representing S. W. Hopkins & Co., who claimed to be financial agents to sell said State bonds for the benefit of the Jacksonville, Pensacola and Mobile Railroad Company, made some arrangements with the plaintiffs in said injunction by which the injunction was waived, and at the request of said Coddington the said Houstoun authorized Robert H. Gamble, one of said

plaintiffs, the Comptroller of the State of Florida, in whose office he had deposited the said railroad bonds, to deliver the same to the said Coddington, which was done; and the said Coddington delivered the bonds issued by this defendant to the Governor, and obtained from him in exchange the State bonds which had been before issued by the Governor under the law to the Jacksonville, Pensacola and Mobile Railroad Company; and that it was in this way, and without any sanction or assent on the part of this defendant, the Governor got possession of the bonds of this defendant. The answer alleges further that the State of Florida had nothing whatever to do with the form and manner of the execution of said company bonds, and never made or insisted upon any requirements in connection therewith, and that the Governor "*was authorized by law to exchange bonds of the State of Florida for bonds of this defendant.*" The answer then affirms that said State bonds so delivered to Coddington, (before alleged to be the representative of S. W. Hopkins & Co., financial agents, to sell said bonds for the benefit of the J. P. & M. Co.,) have not been sold, and that said bonds are about to be returned to the State and the bonds of this defendant surrendered to it.

There was subsequently an amended complaint filed by the plaintiff, but as it was dismissed as to this defendant, its matter is not material. On the 26th of May, A. D. 1875, within two months of three years after the filing of the original answer and after a hearing upon an appeal in this court, there was filed what purported to be an amended answer of the Florida Central Company, in which it alleged that the resolution of the stockholders authorizing the issue of the one million of bonds was rescinded by a resolution of its directors on the 21st of March, 1870. This resolution, which is made an exhibit, is to the effect that the bonds signed by G. W. Swepson as President, before that time *adopted*, could not be used to carry out the intention of their issue (which, as we have seen, was to pay the stock-

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holders for their stock,) and that the resolution authorizing their issue, be rescinded and the bonds be destroyed. The directors, then, by resolution authorized a new bond to be issued for the purposes of the company. This bond, it appears, was never issued, although its form was suggested. The amended answer alleged that at this time the State bonds were held by Edward Houstoun by agreement with the State of Florida and had not passed to the President of the Jacksonville, Pensacola and Mobile Company; that he held them upon conditions to be performed before such delivery, and that such conditions were never performed. The answer, then, alleges that in conformity with this resolution the State bonds were returned to the State, and the bonds of this defendant were withdrawn from the State and were placed with said Houstoun to be returned to this defendant for cancellation, all of which was agreed to by and between this defendant and the State of Florida; that subsequently, while these bonds were in the hands of said Houstoun for cancellation, they were by him, or some one acting for him, and without any authority or knowledge of this defendant, redelivered to the State of Florida. The amended answer then sets up that the purpose for which the company bond was issued and delivered to the State of Florida was in violation of its charter, and that said bonds are illegal and void. This answer then denies that any interest is due to the State of Florida on said pretended bonds, or that the bonds held by the State are a lien, and affirm that the State bonds are unconstitutional and void, and that the State has never paid any interest thereon, and has never been damnified by reason of its issuing said bonds. The rest of this answer is called a counter claim, but this was subsequently stricken out. There was a reply by the State to the counter claim, which, as a matter of course, went with it.

These pleadings show the issues between the parties. After evidence, there was a decree for the sale of the road, and from this decree this appeal by the company is taken.

What purports here to be an amended answer of the company was not signed by the President or any officer thereof and was not under the seal of the company. It was signed by the attorney of the company and sworn to by one of the directors. The plaintiff insists that this was in no sense an answer of the company, and this is unquestionably true. The Supreme Court of the United States, in *Bronson vs. LaCrosse Railroad Company*, 2 Wall., 302, say, "a corporation must appear and answer not under oath, but under its common seal, and an omission thus to appear and answer according to the rules and practice of the court, entitles the complainants to enter an order that the bill be taken *pro confesso*." (See, also, Ang. and Ames on Corp., 665.) The Code (and this is a Code case) provides that the verification to such answer may be made by any officer of the corporation, but the rule, so far as it requires that the answer shall be under seal, is not thereby changed. This, however, does not meet the question here presented. In this case, this paper was filed after an order of the court permitting the company to file an amended answer, and the plaintiff, so far as this record discloses, makes no motion to strike the paper from the files, nor does the State disregard it, but treats the paper as the answer of the company by replying to it. Under these circumstances, the plaintiff cannot perhaps be heard to object to it upon appeal on the ground of this irregularity. This matter, however, does not affect the conclusion we reach, for, with or without this amended answer, our conclusion is the same. Without deciding this question, therefore, we may consider the amended answer.

An analysis of these pleadings will show that there are four general questions presented for consideration. The evidence applicable to each of these questions will be stated as each question is considered.

First. Did the company have the legal power and authority to issue these bonds held by the State, and if it did have such power, were such bonds to be a first mortgage, with

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the right in the State to seize and sell the road under the statute of 1870?

Second. If such power existed, were there such circumstances connected with the issue, delivery and exchange as excuse the company from their payment?

Third. Is there a remedy in equity as well as the particular remedy provided by the statutes?

Fourth. Are the bonds now held in such manner as to vest a right of action in the State to subject the road and property of the company to sale?

To the first question: This company is a private corporation, and all power which it possesses or can exercise must be derived from its charter, the amendments thereof, or from some action of the legislative department of the government granting such power, either in express words or by reasonable and necessary implication; and it is proper, in fixing the powers of a corporation, as to the character of the contracts it may make (the question here) to regard the general scope and purpose of the grant by the Legislature, and not to disregard entirely reasonable implications resulting from attending circumstances. This we regard as the rule established by a fair construction of the English and American cases—when the question is as to its power to execute a bond, mortgage or contract of like character, with third parties. Where the charter proposes to delegate a sovereign power to the corporation, the rule may be more strict on account of the difference in the nature of such power and a power to mortgage its own property and franchises for its own purposes. 1 Red. on Rail., 5th Ed., 253, and cases cited; Price on *Ultra Vires*, 87, 90, 91, 93, 140, 141; 3 Rob., 513; 3 Md., 305; 2 Dutcher, 221; 1 H. and M., 786; 1 Watts, 385; 6 Humph., 515; 11 Ala., 437; 28 Ala., 321; S. C. 33, L. J., Ch. 93.

The Pennsylvania cases upon this question which have been called to our attention seem to be inconsistent with themselves, and, therefore, one or the other of the inconsistent

views must be contrary to the general rule as deduced from other sources. Black, C. J., in the case of the Pennsylvania Railroad Company vs. Canal Commissioners (21 Penn. State, 22,) says: "Corporate powers can never be created by implication nor extended by construction;" while in the case of Commonwealth vs. Erie and Northeast Railroad Company, (27 Penn. State, 351-2,) he says that the power must be given in plain words or by *necessary* implication. If there is any implication in the matter, it seems to me also that this necessarily involves construction, not indeed the liberal and broad construction to be given to a remedial statute, or the strict construction to be given to a penal statute, but a construction consistent with and following a reasonable view of the general scope and purpose of the legislative grant, viewed in the light of surrounding circumstances.

The Florida Central Railroad Company was incorporated in 1868, and was given all the powers and franchises before that time granted to the Florida, A. and G. C. Railroad, by an act approved January 7, 1853, with power to exercise the said powers and franchises *so far as they appertained to the railroad constructed from the city of Jacksonville, in Duval county, to Lake City, in Columbia county.* In addition to these powers, the act of 1868 gives it the express power to hold lands and tenements, goods and chattels that may be useful for the purposes of the road, and the same to *grant, mortgage* and dispose of. The fourteenth section of an act entitled "An act to perfect the public works of the State," approved June 24, 1869, authorized the Florida Central Company and the several companies owning the line of road between Quincy and Jacksonville to consolidate with the Jacksonville, Pensacola and Mobile Company, which was a company authorized to build a road from Quincy to Mobile. In the event of such consolidation, it authorized the Jacksonville, Pensacola and Mobile Company to raise money by way of mortgage of its property and franchises. It also authorized agreements looking to a common manage-



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ment of these several roads without consolidation. The section then provided that the Jacksonville, Pensacola and Mobile Railroad Company, as to the road or roads, or parts of roads thus acquired, may likewise issue coupon bonds or other evidences of debt, with coupons or otherwise, bearing such rate of interest and payable at such time and place and on such terms as the directors may determine, and to each are hereby granted the same privileges as are herein granted to the Jacksonville, Pensacola and Mobile Railroad Company.

Under this act the J. P. & M. Company was authorized to exchange bonds with the State to the extent of fourteen thousand dollars per mile, the State to have a statutory lien and mortgage upon its property and franchises to secure the payment of the company bonds, with power in the Governor, upon default in payment of principal or interest for sixty days, to take possession of and sell the road; and this right was granted to "each" of the roads owning the line, by the latter portion of the section above quoted. While this section gave the Florida Central Company the same right as the J. P. M. Company to issue its own bond or mortgage, still by an examination of the act it will be seen that it was deficient in that no method was provided by which the mortgage could be used for the great end and object of this legislation, which was the extension of this line of road to Mobile. No action was taken by the Florida Central Company under this act, and perhaps for the reason stated an act was passed on the 28th of January, 1870, amending the act of June 24th, 1869. This act was entitled "an act to alter and amend the act of June 24th, 1869." This act altered and amended the 4th, 9th, 11th, 12th and 20th sections of the previous act, leaving the 14th section which had given the Florida Central Company the same rights as were granted to the J. P. & M. Company in force, and also the 10th section of the act which authorized the J. P. & M. Company to deliver to the Governor of

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the State coupon bonds of the company in exchange for State bonds.

The sections of the act of 1869, thus changed and altered, embraced the 9th section, the section authorizing State aid to the amount of fourteen thousand dollars per mile to be given in exchange for bonds to be delivered under the 10th section, as well as the section (the 11th section) defining the lien which would attach to the company bond in the hands of the State. In lieu of these sections the following provisions were substituted: Under the 9th section as altered the Governor of the State was directed to deliver to the President of the J. P. & M. R. R. Company, in order to aid the construction of its road westward from Quincy, "coupon bonds of the State to an amount equal to sixteen thousand dollars per mile for *the whole line of road and length of railroad owned by or belonging to said Jacksonville, Pensacola and Mobile Railroad Company, in exchange for first mortgage bonds* of said railroad company, of the denomination of one thousand dollars, when the President thereof shall certify upon his oath that the road or parts of road for which he asks for an exchange of bonds is completed, and is in good running order. The said bonds shall be of the denomination of one thousand dollars, signed by the Governor, countersigned by the Treasurer, sealed with the great seal of the State. They shall bear eight per cent. interest, payable semi-annually, and shall be payable to bearer. They shall be dated on the first day of January, A. D. 1870, and shall be due thirty years thereafter, and principal and interest shall be payable at such place in the city of New York as the Governor shall designate. The coupons for interest shall be payable to bearer, and shall be authenticated by the written or engraved signature of the Treasurer; *Provided, however,* that whenever the Jacksonville, Pensacola and Mobile Railroad Company shall or may determine to pay the interest in gold, for or upon their bonds or the bonds designated in

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the tenth section of an act entitled 'an act to perfect the public works of the State,' approved June 24th, 1869, upon giving notice to the Governor of such intention, then the State bonds aforesaid and the coupons for interest on said bonds, shall be payable in gold, notice of which shall be given by the Governor in some paper published in the city of New York, and at the capital of this State, to be designated by the Governor."

The tenth section remained as in the original act.

The eleventh section was altered and amended so as to read as follows: "To secure the principal and interest of the said company bonds, the State of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered on the part of the road for which the State bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises and powers thereto belonging, and in case of failure of the company to pay either the principal or interest of its bonds or any part thereof for twelve months after the same shall become due, it shall be lawful for the Governor to enter upon and take possession of said property and franchises, and sell the same at public auction, after having first given ninety days' notice by public advertisement in at least one newspaper published in each of the following places: The city of New York in the State of New York, the city of Savannah in the State of Georgia, and the city of Tallahassee in the State of Florida, for lawful money of the United States, and for nothing else, except that the State for its own protection may become the purchaser at said sale, and may pay on said purchase any evidences of indebtedness the State may hold against said roads, which purchase money of said evidences of indebtedness shall be paid on the day of sale into the treasury of this State, or within ten days thereafter; and all moneys arising from said sale and paid

into the treasury of this State, as heretofore prescribed, shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State of Florida under this act, and in case the holders of said bonds do not present them for redemption within ninety days after said sale, the Treasurer shall invest the same, or any part thereof which may be remaining in his hands, in the securities of the United States, to be held by the State of Florida, as trustee for the bondholders, until said bondholders shall demand the same, upon which demand the Treasurer shall immediately turn over or pay said securities to the bondholders. The purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchise of said defaulting company, together with the franchise of use and being a body politic, and the Governor shall, upon the payment of the said purchase money into the treasury of this State as above provided, immediately cause the purchaser or purchasers of said road at said sale to be placed in the actual possession, use and enjoyment thereof, and cause all the books, papers and real and personal property of said company, of every description, together with its franchise of use and being a body politic and corporate, to be turned over to said purchaser or purchasers, and the purchaser or purchasers of said road shall be by said sale possessed of all the rights, privileges and franchises of said defaulting company, together with the franchise of use and being a body politic and corporate, and may use any new corporate name they see fit, and make and use a new seal upon signifying their action in writing to the Governor, and thereafter may exercise all the rights of a body corporate and privileges thereof, and of said defaulting company, under said new name, for the term of thirty-five years to date, from the time of the purchase as aforesaid; that any such sale shall be ratified by the Legislature before the same shall become effective."

With this history of this legislation and this statement of

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the provisions of the original act as it stands altered and amended, we reach the additional section of the amendatory act under which it is claimed that the Florida Central Railroad Company had full authority to issue the bonds upon which suit is here brought. This section, (the fourth section of the amended act,) provides that the Governor shall, for the purpose of further aiding said Jacksonville, Pensacola and Mobile Railroad Company in the speedy construction of its road, deliver to the president of said company coupon bonds of this State of the same character as those above described in this act, to the amount of sixteen thousand dollars per mile, upon receiving for and from the President of said company first mortgage bonds of like amount on any part or portion of the road between Quincy and Jacksonville; *Provided, however,* The State bonds under this section shall not be exchanged for first mortgage bonds for a greater length than one hundred miles of any part of railroad between Quincy and Jacksonville, provided the said railroad *company or companies* shall not issue first mortgage bonds to a greater amount than sixteen thousand dollars per mile.

It is plain and clear *from the letter* of this act as amended that unless the exchange provided for under this section is an exchange of bonds *on a line of road other than that owned by the Jacksonville, Pensacola and Mobile Company*, that it is mere surplusage, useless unnecessary and of no effect. The ninth section of the act as amended directed the Governor to exchange bonds with the President of the Jacksonville, Pensacola and Mobile Company *for the whole line of road and length of railroad owned by or belonging to the Jacksonville, Pensacola and Mobile Railroad Company*. Now the exchange thus authorized with the Jacksonville, Pensacola and Mobile Company embraced, as is shown by the pleadings, the line of road extending from Quincy to Lake City; and the other part of the road between Quincy and Jacksonville, to-wit: from Lake City to Jack-

sonville, was all of this line of road that was left upon which an exchange could be had. This was all owned by the Florida Central Railroad Company, and hence the section was of no effect, unless it applied to this company. This construction not only makes the section of no effect, but such construction is inconsistent with a proper view of the other part of the section itself. The first proviso limiting the amount of bonds to be issued under *this section* shows that it was to be an additional issue to that authorized by the ninth section; and the second proviso, using the words, "company or companies," in the connection in which they occur, construed with reference to the fact that the Jacksonville, Pensacola and Mobile Company had been given; under another section, full authority to exchange for its whole line of road, shows clearly that some company other than it was granted authority under this section. This being so, the only company to which this section could apply was the Florida Central Railroad Company. It is not necessary that the statute should use in express terms the name of the Florida Central Railroad Company in conferring this power to issue first mortgage bonds. It is enough, if, by necessary implication, it has the power. The connection between two railroads is an act which requires the concurrence of both; and yet, when a statute authorizes one company to connect with another, the authority is necessarily conferred upon both. So here, where the law authorizes the State to receive from the Jacksonville, Pensacola and Mobile Company bonds upon a line of road not owned by itself, and restricts the company or companies as to the amount they may issue, the power is necessarily granted to those companies to issue the bonds to the extent of the limitation. This is a case similar to that of a clearly implied power, resulting by necessary deduction from the purview of an act of parliament. The joint-stock companies' act of 1844 (7 and 8 Vict. C. 110) having, in Section 45, laid down certain regulations as to the mode in which bills should be

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accepted, &c., on behalf of companies coming within this statute, it was assumed by the English courts as a matter of course that such companies thereby acquired the power to issue bills and notes. *Halford vs. Cameron, &c., Railway Company*, 16 Q. B., 442; 20 L. J. (Q. B.), 160; *Aggs vs. Nicholson*, 1 H. and N., 165; 25 L. J., (Ex.), 348. This case is much stronger than the English cases. They are cited simply to show the extent to which these courts have gone in the matter of implied powers. This conclusion is also consistent with the general purpose, scope and intent of all this legislation, futile though it may have been to accomplish the end desired. That purpose was to extend the line of railway from Quincy to Mobile.

The Jacksonville, Pensacola and Mobile Railroad Company owned the line of road from Quincy to Lake City, where it connected with the road of the Florida Central Company, whose road extended from Lake City to Jacksonville, and the Florida Central Company was given the opportunity, by this legislative action, of aiding in the extension of this connected line (from Lake City to Quincy) to Mobile, thus bringing its own road and the road of the Jacksonville, Pensacola and Mobile Railroad Company in connection with the roads radiating from that point.

This legislation, therefore, gives this company authority to issue "first mortgage bonds;" and the next question is, whether it authorized a bond and accompanying mortgage to be executed in a formal manner by the company, or whether the bond which, under this statute, is called "a first mortgage bond," and to which the statutory lien and remedy attaches, is the bond referred to.

This section of the statute does not, in terms, authorize a bond and a separate mortgage to secure its payment. It, in terms, authorizes a "first mortgage bond." The terms, "first mortgage," qualify the term "bond," and the necessary result is that it means a bond that is to be a first mortgage without such additional formalities of executing a

mortgage, if such a thing is provided for in the act, and such construction is consistent with the other portions of the act. This is a strict construction, and we think the proper one.

Now, the bond which the Jacksonville, Pensacola and Mobile Company was authorized to issue was a simple bond, which was, under the statute, to be a "first mortgage bond," with a lien of the character defined in the act. No additional mortgage was to be executed to make it effective. In the section of the act making this amendment, the bonds, which the Jacksonville, Pensacola and Mobile Company were authorized to issue, were denominated "first mortgage bonds," the same terms used when this authority is granted the Florida Central Railroad Company. The bond which the Jacksonville, Pensacola and Mobile Company was to issue was a simple bond under the tenth section of the act, and by other sections of the act it is declared a "first mortgage bond," with the statutory lien and remedy incident thereto. In addition to this, the section authorizing the Governor to enter upon, take possession of and sell the property to which the lien attaches, provides that the State, at such sale, "for its own protection, may become the purchaser at such sale, and may pay on said purchase any evidences of indebtedness the State may hold against said *roads*." If it was to have this lien only as to one road, the use of the term *roads*, instead of *road*, cannot be explained. If it has it as to two, it is all consistent, and if there is more than one, the other must be the Florida Central Railroad, as it and the Jacksonville, Pensacola and Mobile Railroad are the only two to which the term can apply, as they are the only roads which are authorized, under the act as altered and amended, to issue "first mortgage bonds." The necessary conclusion, we think, is that the first mortgage bond intended was the bond authorized by the tenth section of the original act, and to it in the hands of the State attached the lien and remedial rights provided in the act for its enforcement.

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The company here has issued a bond under the tenth section of this act, and its acts have been in accordance with the law as construed by itself. A dissenting stockholder may well resist the company, or even its creditors, in enforcing claims of this character; but where the company has accepted the act and executed its bond, a plea of a want of authority while it must be sustained in all cases where it is good, yet in the language of Lord St. Leonards, "one cannot but lament to see great companies like this, with an attorney always at its command, with every means of consulting counsel daily, if it thinks proper, entering into a contract with a full knowledge of all their powers, and with legal advice constantly at command, turning round upon the party with whom they have contracted, and endeavoring to evade the contract upon the ground that the contract they entered into is beyond their powers, and absolutely illegal on the face of it. One cannot but regret that these companies should resort to so unseemly a defence in courts of justice." 15 Eng. Law and Eq. 367.

We now reach the second general question. Were there such circumstances connected with the issue, delivery and exchange of these bonds as excuse the company from their payment? The allegation in the amended answer of this company to the effect that a resolution was passed rescinding the resolution which authorized the issue of the bonds signed by Geo. W. Swepson, as President, (the bonds now sued upon), and directing their destruction, was passed as stated, but the resolution was never carried out and the bonds were not destroyed. It is hardly necessary to say that a debtor cannot destroy his obligation by resolutions of this character unexecuted. It is true as alleged in the amended answer, that Houstoun returned the bonds of the State to the State, after their first issue, and received the company bonds in return; but it is not true that the bonds, with any assent of the State or of Houstoun were in his hands, to be returned for cancellation, or that there was any agreement

on the part of the State of Florida that they should be cancelled. Houston retained the State bonds, and as the first answer admits, until Littlefield paid him certain debts. He received these bonds under his contract, which was that instead of selling the State bonds he might return them and take back the company bonds; and he was to hold them until other bonds of the company were delivered to him. Instead of doing this Houston delivered the company bonds to Coddington, and the State delivered its bonds in exchange to him. Now it may be that, under some circumstances, the want of an express assent by the company to these acts might be of some avail as against parties not *bona fide* holders for value of these bonds, but that question does not arise here, and we desire to express no opinion upon the subject. In addition to this, too, it must be remembered that Littlefield and Houston, who together represented a very large majority of this stock, and to whose wishes the company seems in all its acts to have yielded assent, agreed to this exchange, and made no objection. But, however, all this may be, the allegations of the original answer, so far as it states facts, may be admitted; and the allegations in the amended answer may be admitted to the extent they are sustained by the evidence as above shown, and there is but little in these allegations where viewed in the light of the subsequent action of the stockholders of this company.

On the 13th of May, A. D. 1871, after the company had failed to destroy its bonds as its directory had resolved, and after Coddington had made the exchange with the State, with the assent of Houston and Littlefield, Mr. Houston offered the following resolution at a meeting of the *stockholders*:

“Resolved, That Edward Houston do place the bonds referred to in the preamble and resolutions of the stockholders, adopted June 20th, 1870, in the hands of S. W. Hopkins & Co., for the purpose mentioned in said resolutions, subject

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to the same exceptions as therein expressed with respect to the proportion thereof applicable to the stock owned by other parties, and according to the same terms therein mentioned."

The resolution was adopted. The bonds here referred to are the bonds now held by the State. So far as the exchange of these bonds by the company is concerned, here is its express authority given for it, and that must be an end of this matter.

We now reach the third general question. Is there a remedy in equity as well as through the exercise of the power of sale given the trustee under the statute?

It is insisted that these statutes give a new right and prescribe a particular remedy not known to the common law, and that such remedy must be strictly pursued, and is exclusive of every other.

The power of this corporation to make this particular first mortgage bond, and by its act create the trust, must result from legislative grant, as the corporation has not, like an individual, a general power to contract except where there is a limitation. But when a power granted by the Legislature to a corporation is exercised, and it results in a contract which the statute makes a mortgage, and to which it attaches a trust, it is as if the same power was exercised by an individual so far as the mere act of making the contract is concerned. It is true that neither a court of equity nor law can, as a general rule, aid the defective execution of a statutory power, because the manner of the exercise of the power is a matter of public policy; but if a contract is made and executed by virtue of a statute, (the only way in which a corporation can contract), and that contract is a mortgage or involves a trust, there is a relation and right created which is well known to equity.

If there is a trust and mortgage, and connected with them in order to their due enforcement there is a statutory power of sale, cannot a court of equity at the suit of the trustee

decree a sale conformably to the statutory power? We cannot see that the Legislature in authorizing a corporation to execute a mortgage bond to have a statutory lien of defined character with a power of sale in a trustee named, is a statute giving a new right within the meaning of the authorities upon that subject. The cases reported in 1 Michigan, 200; 3 Mass. 310; 5 John. 174; and 5 Mass. 515, are clearly distinguishable from this. A statement of the case reported in 5th Mass., in which the opinion is delivered by Mr. Chief Justice Parsons, will show the clear distinction between this case and the class of cases sustaining the view maintained by the company here. "By the statute of 1874, c. 66, § 1," says Chief Justice Parsons, "every person convicted of larceny might be punished by a fine not exceeding one hundred pounds, or by whipping not exceeding thirty-nine stripes. And the third section provided that besides the said punishment he should be sentenced to forfeit to the owner treble the value of the goods stolen, deducting the value of such of them as might be returned; and if the offender should be unable to pay the same he might be further sentenced to make satisfaction by service to the owner, who was empowered to dispose of him in service for such time as the court might assign. But it was enacted in the tenth section that unless the owner shall sell him in service within thirty days, or give to the gaoler security to pay the charges of keeping the convict in prison, the gaoler may set him at liberty, the prisoner paying him the prison charges.

"When a statute creates a new right without prescribing a remedy, the common law will furnish an adequate remedy to give effect to the statute right. But when a statute has created a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy.

"In the case before us the right claimed by the plaintiff to receive the treble damages is given by the statute which

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also prescribes his remedy. Upon the sentence the defendant was in execution. If able to pay his body was a pledge to the plaintiff; if unable the plaintiff might dispose of him in service for nine months. This disposition he was not obliged to make within thirty days if he would secure the prison charges to the gaoler. On giving security he might retain the body as a pledge until payment.

"But he wholly neglected his remedy. The defendant not being able to pay, the plaintiff did not dispose of him nor retain the body by giving security. The defendant was afterwards lawfully discharged, and the plaintiff has now no remedy."

Now here was certainly a new right and new penalties. If the right is new, then as remarked by Chief Justice Parsons, "the common law will furnish an adequate remedy to give effect to the statute right." But if the rights and relations created are known, then there will be known remedies. We think that the power of a court of equity attaches in this case and that the remedy prescribed by the statute is not exclusive.

The court of equity, however, should follow the law giving the right in its decree as to time of sale and appropriation of trust funds, and we think the franchise to be a corporation will pass, as it is covered by the lien as defined by the statute. 2 Chand. 103; 1 Wis. 432; 55 Penn. State, 204; 8 Ala. 694; 15 Texas, 269.

In this case equities were claimed by the trustees of the Internal Improvement fund by which they insisted they had rights paramount to those of the State or the bondholders, and in most cases of this character there are differences to be settled which necessarily call into action the plastic and extensive powers of a court of equity in the matter of mortgages and trusts. This is a trust coupled with a mortgage and power of sale. 3 John. Ch'y 344; 2 Met. 252.

Having determined that there was power in the company under the statutes to issue these bonds, and having deter-

mined also that the last action of the stockholders approving their issue for purposes of exchange is binding and effective upon the company, notwithstanding the previous unexecuted order of its directory to destroy them, and that there is a remedy in equity under the mortgage and trust, the next question is whether under the present status of these bonds, as disclosed by the testimony, any cause of action has accrued to the State as trustee. The State insists that Littlefield's testimony is "that the four million of bonds were sold on November 14th, 1870, but the J. P. & M. Company could not deliver the one million of bonds received from defendants until the stock in the Florida Central Company was paid for. Stockholders of defendant company trusted Houstoun to hold bonds until stock was paid for. Houstoun delivered them to S. W. Hopkins & Co., to their agent, Coddington, upon his promise to pay for stock. (*Vide* exhibits H, J, K, L, M, and N.) Of course this delivery was in satisfaction of the contract of sale of 14th of November, 1870. The deed of trust (exhibit R,) shows that not only have the State bonds received for defendants' bonds been sold by the J. P. & M. R. R. Co., but that they are in Europe, and said company made provision in said deed of trust to pay interest to the State on account thereof; and further, the testimony shows that S. W. Hopkins & Co. made advances on the very bonds before they were sent to Europe, and paid Houstoun for his stock and P. & G. R. R. bonds. Hopkins & Co. also accepted draft for \$227,000 to pay debt of J. P. & M. Company, due Board of Trustees, which, if not paid, they are now liable to pay.

The Florida Central Company insists that the State bonds delivered to Coddington by the Governor for its bonds have not been sold, and that said bonds are about to be returned to the State, and the bonds of the company returned to it. This is a material issue involving a consideration of the evidence, and we proceed to examine all of it having reference to the subject.

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The testimony of Chas. H. Foster is not material in the consideration of this subject. What he says relates to matters other than the present status of the State bonds.

Harrison Reed, who was Governor of the State at the time of the exchange, says little that has any bearing upon the subject. He states that about the time of the exchange he was given a draft of \$227,000 by the President of the J. P. M. Company upon S. W. Hopkins & Co. Upon the draft acceptance was waived, and no acceptance was shown. There was nothing but an unaccepted draft of Littlefield. This witness further says that Coddington was the agent of the State to see that this draft was paid from the proceeds of sale of the one million of bonds, but no contract pledging the bonds or their proceeds in that way for this sum is shown upon the part of any person. This witness states further *that the draft was never paid*, and no report was ever made to him *as to the disposition of the bonds or their proceeds*. This witness mentions some receipt of Coddington given to him, but it is evident that the receipt referred to was a receipt given by Coddington to Houston, to which we will refer hereafter. If it was not this receipt, then its nature is not disclosed.

M. S. Littlefield's testimony covers the matter of the issue of the bonds, and relates to the nature of contracts between himself, Houston and others, to which we hereafter refer as exhibits. He states that the stock he purchased of Houston was paid for about the 13th April, A. D. 1871, by S. W. Hopkins & Co., the fiscal agents of the J. P. & M. R. R. Company in New York and London. The witness then states that the J. P. & M. R. R. Company closed a contract with S. W. Hopkins & Co. *to sell* the four millions of State bonds on the date of a letter in evidence, which is one of the exhibits hereafter referred to. That John Collinson, a civil engineer and broker, residing in England, was the man with whom Messrs. Hopkins & Co. "*contracted to sell*" said bonds for the J. P. & M. Co. That C. L. Chase went to

Europe to negotiate the bonds of the company and to return to the State the State bonds. That in *November, A. D. 1870, when the company offered the State bonds for sale to S. W. Hopkins & Co., it did not have the control of but three millions of said bonds. When the agreements were carried out between Houstoun, Sanderson and himself, the other million of State bonds would be controlled by the company. There were separate agreements between Houstoun and himself to be carried out before the last million of State bonds could be controlled by the J. P. & M. Company.*

This testimony does not establish a sale of these bonds, nor does it show that any advances were made upon them. It shows that at the time of the *offer to sell* the four million to S. W. Hopkins & Co. the J. P. & M. Co. controlled only three million, and that certain agreements between this witness and the two parties, Houstoun and Sanderson, were to be carried out, and then the J. P. & M. Company might control the bonds. There is no evidence here that the contract to sell the one million bonds of this company to any person was ever carried out, or that there was any sale or pledge of the bonds. The naked declaration of the witness that Houstoun was paid by S. W. Hopkins & Co., the financial agents of the J. P. & M. Co., does not prove a sale of these particular bonds. They had other securities of the J. P. & M. Co. in their hands, and besides, Littlefield, as we shall presently see, swears positively that these bonds are not sold. So far, therefore, as Littlefield's testimony is concerned, it does not show that these bonds are now in the hands of a purchaser, or that they are held as security for any advances.

We come now to an examination of the exhibits which the State relies upon. Plaintiff claims that exhibits H, I, K, L, M, and N, have an important bearing on this question. Exhibit H does not even mention these bonds. Exhibit I is an agreement between M. S. Littlefield and Houstoun, which does not even mention the State bonds. Exhibit K is an

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agreement between Littlefield and Houstoun, by which Houstoun was to hold the one million of the bonds of the State, authorized to be exchanged under the act, to secure him in the payment of an unaccepted draft of Littlefield to him upon S. W. Hopkins & Co. for \$163,026.70, bearing date May 13th, 1870. After payment of this draft and expenses of sale of bonds, the balance was to be applied to other debts therein named. Under this agreement Houstoun had the option, upon the maturity of the note, of returning the State bonds and receiving in lieu thereof the one million dollars first mortgage bonds of the company. *The evidence shows, and it is admitted, that he did return the State bonds and received the company bonds.* This exhibit clearly does not prove a sale.

Exhibit L is a receipt given by Coddington, the agent of S. W. Hopkins & Co. for this one million bonds of the Florida Central Company. In this receipt he declares that he holds these bonds in trust for Houstoun, to pay him other sums for other parties named. The arrangement, however, was "based on the assumption that the money would be paid from the proceeds of bonds negotiated by S. W. Hopkins & Co., of New York." The remainder of said proceeds was to be disposed of as directed by the parties interested. These company bonds Coddington exchanged for State bonds. The other evidence shows this, and hence we must look elsewhere than to this exhibit to trace the bonds of the State.

While Coddington contracted to hold the company bonds in trust, he in fact exchanged them for State bonds. These he received as the agent of S. W. Hopkins & Co., who were fiscal agents of the J. P. & M. Co. It cannot be said that the receipt shows either a pledge or sale of these particular State bonds. This receipt of Coddington is dated the 11th January, 1871. The next thing in the case stated having reference to the locality and status of the one million of State bonds is a receipt (marked exhibit M) of S. W. Hop-

kins & Co., given to Littlefield on the 15th April, 1871, for an order upon E. Houston for the delivery of certain Florida Central Railroad stock and bonds of the Pensacola & Georgia and Tallahassee Railroad Companies, held by Houston, upon their payment to Houston of \$163,026 70, S. W. Hopkins & Co. agreeing to hold these securities as collaterals for the payment of this sum, as well as for any *subsequent advances that may be made by them* against the one million of bonds formerly held by Mr. Houston, until sufficient money shall be realized from the sale of said million of bonds to reimburse them for said advances, or until the bonds shall be taken from market and returned to the State, and some mutually agreed upon plan between said Littlefield and themselves adopted to reimburse them, or by issue of railroad bonds, land floats, or any other securities deemed expedient. In this receipt for the order of Littlefield upon Houston, S. W. Hopkins & Co. agree to hold the securities mentioned as collateral for payment of the sum of \$163,026.70, as well as for any "*subsequent advances that may be made*" against the one million of bonds, until sufficient money may be realized from the sale of said million of bonds formerly held by Mr. Houston, and it was agreed that they might "take the bonds from market and return them to the State." When it is remembered that this firm were the agents of the J. P. & M. Co., who had their bonds in hand to sell them, the amount of this paper is simply that in the event they made advances against the one million they might pay themselves from the proceeds of sale. It does not prove that they have made such advances, or that the bonds have been sold. It establishes that these bonds are in their hands for sale or to secure advances that "*may be made.*"

Exhibit N, to which importance is given by the plaintiff, is a letter of M. S. Littlefield to S. W. Hopkins & Co., offering to sell them the entire four million bonds authorized to be issued by the State. It is as follows:

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58 OLD BROAD STREET, LONDON, NOV. 14, 1870.

MESSRS. S. W. HOPKINS & CO., LONDON:

Gentlemen: I herewith offer you 4,000 Florida State 8 per cent gold bonds in aid of the Jacksonville, Pensacola and Mobile Railroad Company for one thousand (1,000) dollars gold each, at the price of one hundred (£100) pounds sterling for each bond in the city of London, subject to the commission agreed as per contract dated 13th day of April, 1870, with your good selves.

I remain, gentlemen, yours faithfully,

M. S. LITTLEFIELD,

J. P. & M. R. R. Co.

This is nothing more than an offer to sell these bonds, made a year before they were delivered to Coddington. There is nothing to show that S. W. Hopkins & Co. made such a purchase or took the bonds on these terms, or that they now hold this one million for any advances, or that any person has either paid or advanced money on these bonds to the J. P. & M. Co. This receipt to Littlefield, dated April 15, 1871, long after this letter in which they speak of *subsequent advances that may be made by them*, shows that there was no sale to them.

Exhibit O is a resolution of the stockholders of the Florida Central Company, passed May 13, 1871, authorizing E. Houstoun to place the bonds referred to in the preamble and resolutions of the stockholders of the company, adopted June 2, 1870, in the hands of S. W. Hopkins & Co. for the purpose mentioned in said resolution, subject to the same exceptions as therein expressed with respect to the proportion thereof applicable to the stock owned by other parties and according to the terms therein mentioned. This resolution, as a matter of course, does not show the present locality of the State bonds. Exhibit M, as we have before seen, shows the condition of the bonds, long after this resolution, in the hands of S. W. Hopkins & Co., and it is unnecessary to repeat here what has been said in that contention.

The plaintiff insists that exhibit R, which is a deed of trust executed by the President of the J. P. & M. R. R. Co. to D. G. Ambler, F. H. Flagg and C. L. Chase, on the 2d of October, 1871, shows the sale of these bonds by the J. P. & M. Co. The President of this company, by their deed, in consideration of a contract by the Florida Construction Company to construct the road westward from Quincy to Mobile, conveyed to the parties named in trust for the period of two years the rolling stock and equipments, &c., of the road, as well as the franchises incident and necessary for the operation of the road. While we think that the recitals in such a deed are not evidence against the Florida Central Railroad Company, an entire stranger to the instrument, (and indeed this objection is applicable to many of these exhibits,) yet these recitals do not show a sale of the one million of bonds, when construed with the testimony of Chase, one of the trustees named in the deed, and Collinson and Coddington. To this testimony we refer subsequently, and here only examine these recitals. The deed recites that the Jacksonville, Pensacola and Mobile Company has received from the State of Florida certain bonds; that this company is responsible for the payment of the interest on these bonds, and makes it the duty of the trustees to pay this interest under certain circumstances. The party of the first part transfers the proceeds arising from the negotiation and sale of the before-mentioned bonds yet to be received, and which are now on deposit in London, to the receipt whereof the authority of John Collinson, of London, is necessary to be obtained; and such balance of the proceeds of the sale of the remainder of the said sum of four millions of bonds as remains unapplied by the party of the first part at the date of execution of the deed. In the payment of the liabilities which these trustees assumed, the deed provided "that they shall be limited and restrained to the proceeds of the sale of such of the aforesaid four millions of dollars of the bonds of the State of Florida as may come to

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their hands, exclusive of the said \$1,200,000, *now on deposit in London, which said \$1,200,000 of bonds shall be applied exclusively to the completion of said railroad.*" The deed further provides that nothing in the contract shall be construed to interfere or conflict with any contract or arrangement that has heretofore been made with John Collinson or Aaron Barnett, or their associates, for the sale or negotiation of bonds that may have been or may hereafter be issued.

The several recitals in this deed must be construed together and made consistent. The general power as to the contract for the proceeds of *four millions* of bonds, is afterwards limited, and in this limitation \$1,200,000 of these bonds are stated to be on deposit in London, and these parties contract to apply these \$1,200,000 of bonds to the completion of the road, at the same time agreeing not to interfere with any contract or arrangement for the sale or negotiation of bonds made with Collinson or Barnett. A fair construction of these recitals shows that \$1,200,000 of the four million of bonds are on deposit in London, and we are by this contract left in doubt as to whether the one million of bonds then on deposit are not the bonds of the State exchanged with the Jacksonville, Pensacola and Mobile Company for the bonds of the Florida Central Company, which are the bonds out of which the rights and equities claimed in this suit by the State arise. This question is settled by an admission of the State through its attorney placed on record that the Florida Central Railroad Company could prove by *John Collinson that the bonds of the State issued for the Florida Central Road have never been sold, and that nothing has been paid by the State on said State bonds and coupons*; and by a like admission of the attorney of the State that *C. L. Chase, who was one of the trustees in this deed, could prove that he was in London in 1873; that he went there to get State bonds back and found they had not been sold; that he was defeated by the action of the State in this suit from receiving the return of the State bonds; and*

the State bonds had not been sold at the commencement of this suit. The attorney of the State consented not only that the Florida Central Company could prove these facts, but also that the statements containing these facts should have the same force and effect, as testimony, as if said statements were depositions duly taken by commission from court.

All of this is established by the following admission and agreement of counsel, which we find in the record:

"State and Trustees vs. Jacksonville, Pensacola and Mobile Railroad Company and others—Duval Circuit Court.

"Defendant, Florida Central Railroad Company, can prove by T. B. Coddington that the bonds of the Florida Central Railroad Company were delivered by him to the State of Florida and he received the bonds of the State; that the transaction was secret, and to avoid legal interruption of the same, he took a carriage and proceeded beyond the limits of Florida; that all this was done without the knowledge or consent of this company; that he received the one million of Florida bonds from the State as the agent of the State, and after the Florida Central Railroad Company had rescinded its resolution pretending to authorize the exchange of bonds; that he received the bonds now sued upon from Edward Houston after the rescinding of said resolution, as well as after they had been returned to the company in compliance with the rescinding resolution; that he was to receive twenty-five thousand dollars for carrying out this negotiation, which was unauthorized by said company and a wrong upon the same; that the State knew at the time of receiving the company's bonds and delivering the State bonds to Coddington that the rescinding resolution had been passed, and that Houston nor any other person had been given any authority by the company or the directors subsequent to the passage of said rescinding resolution to surrender said bonds to the State or exchange the same for State bonds, or part with said company bonds.

"And by John Collinson, (50 Old Broad Street, London,)

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that he received the State bonds from Coddington; that he received and held them as the agent of the State of Florida; that the State coupons, up to January, 1873, were sent to New York City, to the place for the payment of the Florida Central Company pretended coupons, to be surrendered in exchange for the Florida Central Railroad Company coupons; that he notified the Governor that they were there and requested him to send the railroad company coupons there for exchange; that nothing has been paid by the State on said State bonds or coupons, and the said State bonds and coupons have never been sold.

"By C. L. Chase, Austin, Minnesota—"Was in London in 1873; went there to get the State bonds back and found they had not been sold." The circumstances of Houston's delivery of the company bonds to State through Coddington; that he was defeated by the action of the State in this suit from receiving the return of the State bonds, and the State bonds had not been sold at the commencement of of this suit.

"State of Florida, {
 Duval County. }

"Personally appeared M. S. Littlefield, a stockholder of the Florida Central Railroad Company, and he being duly sworn, says that he is such stockholder; that the facts stated above can be proved by the parties above named; that the testimony of said parties is material and cannot be dispensed with by the defendant in the cause or otherwise; that said parties reside beyond the limits of the State of Florida.

M. S. LITTLEFIELD.

"Sworn to and subscribed before me this 24th day of June, A. D. 1875.

J. H. DURKEE,

Notary Public and Referee.

"I hereby consent to the foregoing statement of what the Florida Central Railroad Company can prove by T. B. Coddington, John Collinson and C. L. Chase, sworn to by M. S. Littlefield, be admitted as testimony for the defendant, and

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that such statement shall have the same force and effect, as testimony, as if said statements were depositions duly taken by commissioners from this court. H. BISBEE, Jr.,

June 24, 1875.

Plaintiff's Attorney."

It is thus apparent from this testimony that these bonds are either in the hands of Collinson unsold, or in the control of S. W. Hopkins & Co., the agents of the Jacksonville, Pensacola and Mobile Company, undisposed of or unsold. If in the hands of S. W. Hopkins & Co., and the statements of their receipt (Exhibit M.) are accepted as true, they are held as collaterals to secure "subsequent advances that may be made by them against the one million of bonds," and the proof nowhere shows that any such advances were made against these bonds; on the contrary, by the admission of the State, they are unsold. Under these circumstances, there being jurisdiction in a court of equity to enforce the trust by decree and sale, has the State a right of action as against this defendant?

In the case of Holland vs. the State of Florida, 15 Fla. 454, we held that while the State bond as an obligation against the State, as a simple and primary debtor, was void for the want of constitutional power in the Legislature to authorize such obligation, yet that *under the statute* the State held the bonds of the company and the mortgage lien enuring thereby for the benefit of the holder of the State bonds. That the State, *under the Statute*, was to occupy these two relations, and that while the one failed for want of constitutional power in the Legislature to authorize it, the other must be sustained because the Legislature did have the constitutional power to create it, and it was the duty of the court to enforce it. This court did not hold that the relation and rights of the State as "trustee" were the *result of any equity springing from the circumstances, independent of the statute*, but that its relation as a trustee *was a creature of the statute*. That viewed in this light the lien created by the statute and the company bond was for the

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benefit of the bondholders, and the property and franchises of the company were to be his security for payment. Whether his right was limited to the amount he actually paid for the bond we did not there decide. The view that the holder of the bond is restricted to the amount paid, so far as it is mentioned or based upon the idea that this court created such an equity as before referred to, is erroneous. We are inclined to think that the rights of the "holders" of the State bonds, if there are any such "holders" within the meaning of the statute, and entitled to its protection, are co-extensive with the lien of the State. The *statute* provides that "*all moneys arising from the sale*" shall be applied to the payment and satisfaction of the bonds issued by the State of Florida, and in the event of an investment of the proceeds before satisfaction of the claims, that the securities shall be "held by the State of Florida as trustee for the bondholders until said bondholders shall demand the same upon which demand the Treasurer shall immediately turn over or pay *said securities to the bondholders.*" In the face of this express provision of the statute, how can a court of equity decree that the "bondholders" shall receive a *part* instead of "*all moneys*" arising from the sale, or a part instead of all the securities purchased with such money, and held as "trustee" by the State? Nor is it any reason for releasing the company that the State is not bound, when under the statute the company is bound at all events.

With this statement of that decision, and our explanation of it, it is only necessary to say further in reference to the present case, that no cause of action has been here shown by the State, as the records and proofs, instead of disclosing the existence of a "bondholder" within the meaning of the law, show simply that the bonds are unsold and still in the hands of the agents of the J. P. & M. R. R. Co. This company cannot hold these bonds with the right to enforce the lien of the State against the Florida Central Railroad Company under the statute. The consideration which was to

enure to the Florida Central Railroad Company for the bond which it transferred to the J. P. & M. Co., was the increased traffic and other results following an extension of the line of road owned by the J. P. & M. Company, which connected at Lake City with the road of this company; and, under the law, the duty of the J. P. & M. Company was, by an exchange and sale, to apply the proceeds to the extension of the line.

The Florida Central Company has, as against the trustee, the State, and the J. P. & M. Company, the right to resist such claim by the State in behalf of the J. P. & M. Company. The bond of the Florida Central Company is exchanged with the J. P. & M. Company under the law to enable it through an exchange with the State to receive the State bond, and to apply the proceeds of the sale thereof to the construction of this line of road. It would be entirely inconsistent with this whole legislation and the legal duties and rights of the J. P. & M. Company resulting therefrom, to permit it to hold bonds of the State of Florida, exchanged for bonds of the Florida Central Company, as a creditor of the latter company collecting through the trustee, the State, interest from the Florida Central Company.

Upon the issues and evidence as admitted by the State the case was with the defendant the Florida Central Railroad Company, and the bill should have been dismissed as to this company. This judgment, however, should have been without prejudice.

We next consider the appeal of Edward M. L'Engle. He claims to "represent and stand in the place of the Jacksonville, Pensacola and Mobile Railroad Company" for the purposes of this appeal, being a stockholder therein. This cannot be. The corporation is an artificial thing representing the whole body of the stockholders, and no one stockholder can prosecute an appeal from a judgment against the corporation. He can no more do so than could A prosecute an appeal against B. The same rule applies which

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prohibits an individual stockholder from appealing or answering in the corporate name. In such case the corporation would not be before the court. No decree rendered against it would be binding. (2 Wall. 302.) If such is the right of one, it is the right of all, and each might set up a separate and inconsistent defence, and in any suit against a corporation we would have a half dozen inconsistent answers representing the same interest. *Bronson vs. LaCross Railroad Company*, 2 Wall. 302; 2 Blatch, 343; 15 Ill. 185; 25 Ill. 225; 6 Black, 69; 3 A. K. Mar. 27; 4 Ired. Eq. 195; 19 Eng. L. & E. 7; 1 Phil. 790; 4 Hals. 795; 29 Ga. 434; 4 Rand. 359.

This stockholder having no right to appeal for the company, that corporation is not before this court, nor can the judgment against it be reviewed on this appeal.

This party appeals also from an order dismissing the bill as to him, he having been sued as a stockholder in these two roads. After answer of this defendant, but before decree against him as such stockholder, the court, on motion of the defendant, "ordered and adjudged that the cause be discontinued as to the said defendant at the plaintiff's costs." This is an order dismissing the bill, "with costs," and there was neither counter-claims nor cross bill. It was the duty of this defendant upon this order of the court to prepare and present his memorandum of costs, and have them taxed. As remarked by the Supreme Court of Wisconsin, "The opposite party may well be supposed to be unable to tax the cost of his adversary," (4 Wis. 283,) and this taxation was necessary to a formal demand upon the plaintiff for these costs, or if defendant wished to ask a formal judgment he should have furnished the court with a memorandum of his costs. Whether he could have such judgment against the State is a question we do not consider. He could have had his costs taxed at any rate, and the rule controlling the subject would have been that applicable to ordinary civil suits of the State. We do not think it is too late to do this

now, and upon remanding this case such supplemental proceedings may be had if the party so desires. The order dismissing the bill as to this defendant is affirmed.

We next consider the appeal of Fannie S. Papy, executrix of the last will of Mariano D. Papy, deceased, and the appeal of Robert J. Washington. The only order that can be made in this court as to these two persons is to dismiss the appeal in each case.

The question as to the appeal of the executrix of the last will of Mariano D. Papy, deceased, is one easy of solution, about which there can be no doubt, controlled as it is by the most simple and elementary principles. The case so far as material, may be stated thus:

The Trustees of the Internal Improvement Fund (plaintiffs) allege that Mariano D. Papy holds certain securities which "equitably belong" to them. After answer of M. D. Papy and evidence taken in reference to the status and history of these securities, there was judgment declaring the Trustees of the Internal Improvement Fund entitled to them. (This judgment is dated August 20, 1875.) In no portion of this record, before this judgment, is there a suggestion of the death of Mariano D. Papy; and the only thing in reference to the whole subject is a certified copy of letters testamentary issued to the executrix of the last will of Mariano D. Papy, deceased, which were issued the 11th of July, A. D. 1875, and were filed in this cause the 6th of January, 1876, after the rendition of the final judgment. It thus appears that Mariano D. Papy had died before the decree was pronounced. The cause of action not surviving, as a matter of course the suit by his death abated as to him. No order of the court or other matter making his executrix a party is in the record. For this reason she had no standing in the court below, and is in no condition to be heard upon appeal here.

What may be the proper proceeding upon the part of the plaintiffs to revive the suit as against the executrix, or what

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may be the proper proceeding upon the part of the executrix to be made a party in the court below to contest the validity of this judgment against her testator, are matters for the consideration of each of these parties. So far as this court is concerned the executrix is in no condition to prosecute an appeal. The simple filing of letters testamentary after final judgment against her testator makes her no party to the suit, and the appeal, so far as she is concerned, must be dismissed. This general subject in proceedings other than under the code, is examined in the case of *Alston vs. Rowles*, 13 Fla. 113; and there is nothing in the code which sanctions the proceeding here had by the executrix.

The case of *Robert J. Washington*, without going into unnecessary details, is this: The Trustees of the Internal Improvement Fund, plaintiffs, bring this action against *Milton S. Littlefield* and the *J. P. & M. R. R. Company*, claiming that they are entitled to certain securities purchased by him or the company, under an agreement made with the trustees to purchase and surrender these securities to them for cancellation. On the 20th of August, A. D. 1875, the court "adjudged" these securities to be the property of the trustees, and this is the final judgment rendered as to them. On the 6th of January, A. D. 1876, *Robert J. Washington* filed, among the papers in this case, the report of a special master of the Circuit Court of the United States for the Northern District of Florida, stating a sale on the 2d day of August, 1875, of the interest of *M. S. Littlefield* in these securities, under a decree made in a case pending in the Circuit Court of the United States, wherein *John H. Miller* was plaintiff and *Milton S. Littlefield* and others were defendants. The master reported that at this sale *Robert J. Washington*, through his agent, *E. M. L'Engle*, was the purchaser of said securities. Upon the same day a certified copy of the decree of the Circuit Court of the United States in the case stated, directing a sale of *Littlefield's* interest in these securities, was also filed in this case.

The record discloses no action taken by the Circuit Court of Duval county upon the filing of these papers. Robert J. Washington was no party to the record at the date of the final judgment, and at no time did he ask the court to make him a party for any purpose. The claim made here is that he has all the interest in these securities which M. S. Littlefield had; that while not a party to the proceedings in the Circuit Court, he has the right to join in the appeal, and to represent and stand in the place of M. S. Littlefield, as his successor in the ownership of the bonds affected by the judgment of August 26th, 1875. These papers filed by Washington constitute no part of the record of the judgment in the Circuit Court of Duval county. That court has taken no action in reference to them, nor has it been asked so to do. To the final judgment Washington is neither party nor privy. As remarked by Chief Justice Marshal, "the only parties the court can know are those in the record. They cannot permit counsel who represent parties who may think themselves interested, not in the record, to come in and interfere." 9 Pet. 494. The code, which controls this appeal, provides that "any party aggrieved may appeal;" and this means "a party to the record or his representatives, and not any person who may feel aggrieved when he is no party to the suit." 28 Barb. 306. The court in the case in 7 Paige, 51, cited by appellant, holds that where an executor institutes proceedings in his own name only before the surrogate, any other person who has an interest in establishing the will, and who would be precluded if the decision was against its validity, has an unquestionable right to intervene and make himself a party to the proceeding. Chancellor Walworth cites as authority for this view the laws and practice of the English Ecclesiastical Courts; and such is unquestionably the practice in those courts, when exercising original jurisdiction in this particular matter. The Chancellor remarks further: "And they probably have the same right to come in as interveners to protect their rights

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on appeal." For this statement of a probability he gives no authority, and we can find no sanction for such a practice in any English or American case. By the revised statutes of New York provision is made that any legatee or devisee named in the will, or any heir or next of kin to the testator, may appeal to the Supreme Court from the decision of the surrogate, either admitting such will to probate or refusing the same. 42 N. Y., 279.

In *Philips vs. Shelton*, (6 Iowa, 545,) the Supreme Court of Iowa held that a party has no right to appeal until some question to which he was a party has been adjudicated by the court of original jurisdiction. The action of the party whose appeal was dismissed in that case is very similar to that of Washington here. The action was for specific performance of a contract to convey real estate. S. filed a statement that he was a creditor of defendant, and had had attached the land claimed by the complainant. There was nothing in the transcript to show that S. was made a party to the suit, or that any steps were taken by him further than to file said statement, except to appeal from the decree rendered in favor of complainant. The appeal was dismissed. See also 13 *Smedes and Mar.*, 97; 2 *California*, 57; 13 *La. An.*, 199.

The practice in the English courts is, that a person not a party to the record cannot appeal without some action of the court exercising original jurisdiction as to him or his rights. When not a party to the case, he must first resort to the court below. *Berry vs. the Attorney-General*, 2 *Mac. and Gov.*, 16, cited in 2 *Daniels' Chy. Prac.*, 1541.

In the case of *Gifford vs. Hort*, 1 *Sch. and Lef.*, 41, it is held that if the right of a remainderman or of any person entitled to the estate in any way is bound by the decree, he, as well as the person against whom it was made, has a right to appeal from it. But he does not appeal by filing a simple statement setting forth what he conceives to be his right, and then enter an appeal, as was done here. He files a

supplemental bill to make himself a party to the suit, and to have the benefit of the proceedings therein for the purpose of appealing.

It is said that creditors coming in before the master under a decree may appeal, although not parties to the bill. Such is the remark of the chancellor in the case of Gifford vs. Hort. The distinction between this case and the case of the creditors is evident. A creditor coming into the master's office to contest the claims of others, or to maintain those of himself, is bound by the decree and is substantiantially a party to the case, although his name may not have been inserted as a part. If it is a general creditor's bill, then all creditors coming in are, technically, parties to the bill. The court in this case has taken action with reference to his rights, has exercised original jurisdiction as to him with him before it, and there is the proper basis for the exercise of supervisory and appellate jurisdiction as to the action of the court in reference to his claim or demand.

Even, therefore, if Washington's rights were affected (and it is only in such cases that he can come in and appeal) by the decree against Littlefield, and the practice of the English courts prevail in this matter, (as to which question we say nothing,) Washington has not taken the proper course to give himself the status of an appellant in this court. His appeal must, therefore, be dismissed.

The following judgment will be entered in this cause:

This cause having been submitted at a previous term of the court on briefs by counsel for both parties, and a transcript of the record of the judgment aforesaid having been seen and inspected, it is considered by the court that the appeals of Fannie S. Papy, executrix of the last will and testament of Mariano D. Papy, deceased, and of Robert J. Washington, are dismissed.

It is further considered that the order dismissing the case as to Edward M. L'Engle is affirmed.

It is further considered that there is error in said judg-

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ment as to the Florida Central Railroad Company; wherefore it is ordered, adjudged and decreed that said judgment be reversed as to said Florida Central Railroad Company, and that the case be remanded with directions to dismiss the bill as to said company without prejudice to the rights of persons who may be *bona fide* bondholders under the statute, if any such there be; that the Florida Central Railroad and all property appertaining thereto be delivered to the Florida Central Railroad Company, and that the master in this cause be given such reasonable time for the settlement of his accounts, not beyond the first day of November next, as the court may deem proper, and for such other proceedings as are conformable to law and consistent with the opinion and judgment of this court in this cause.

It is further considered that the respondents recover against the said Fannie S. Papy, executrix of the last will and testament of Mariano D. Papy, deceased, and against Robert J. Washington and Edward M. L'Engle, all costs by said respondents in this behalf expended, and that the costs in this behalf expended by the Florida Central Railroad Company be taxed by the clerk against the respondent, the State of Florida.

APPENDIX.

OPINIONS

OF THE

SUPREME COURT

OF THE

STATE OF FLORIDA,

RENDERED TO

HIS EXCELLENCY THE GOVERNOR,

IN THE YEAR A. D. 1875.



OPINIONS

RENDERED TO HIS EXCELLENCY THE GOVERNOR
IN THE YEAR A. D. 1875.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF
OCTOBER 5, 1875.

1. Where an amendment of a section of a constitution or of an act of the Legislature provides that the section "*is hereby amended so as to read as follows,*" what follows becomes the entire law, and the old section ceases upon the adoption of the new to have any legal force or operation. Such portion of the old section as is reinserted in the new is not repealed and re-enacted by such action; it is continued. Such portion as is omitted ceases to be law upon the adoption of the amendment.
2. Under the amendments of the constitution Justices of the Peace hold their offices for four years from the date of signing and sealing their commissions. Where this time has expired the party ceases to be such Justice, although his appointment was before the amendment and when the tenure of office was during good behavior.

OCTOBER 5, 1875.

To the Honorable Justices of the Supreme Court:

GENTLEMEN: Section 15 of Article VI of the Constitution of this State originally read as follows, viz: "The Governor shall appoint as many Justices of the Peace as he may deem necessary. Justices of the Peace shall hold their offices during good behavior, subject to removal by the Governor at his own discretion." By the ninth amendment to the Constitution, adopted by the Legislature and ratified by the people during the current year, the latter part of this section was amended so as to read as follows, viz: "They may hold their offices for the term of four years, subject to removal by the Governor for reasons satisfactory to him." I would respectfully request your opinion on the following points:

First. Does the above amendment operate to vacate the

commissions of all Justices of the Peace holding office at the time of its adoption, and render new appointments necessary without regard to the date of their appointment?

Second. If it does not, then (with regard to Justices now in office) is the four years to which their term is now limited to be reckoned from the date of their appointment or from the date of the ratification of this amendment to the Constitution?

Third. If the former, then does this amendment operate to remove Justices of the Peace who, at the date of the adoption, had held their offices for more than four years?

I have the honor to be, very respectfully, your obedient servant,

M. L. STEARNS, Governor.

TALLAHASSEE, FLA., October 28, 1875.

His Excellency M. L. Stearns, Governor of Florida, Tallahassee, Florida:

SIR: I have the honor to submit the following reply to your communication of the 5th of October:

Section 15, Article VI, of the Constitution of 1868, was as follows: "The Governor shall appoint as many Justices of the Peace as he may deem necessary. Justices of the Peace shall have criminal jurisdiction and civil jurisdiction not to exceed fifty dollars; but this shall not extend to the trial of any person for misdemeanor or crime. The duties of Justices of the Peace shall be fixed by law. Justices of the Peace shall hold their offices during good behavior, subject to removal by the Governor at his own discretion."

Section 14 of Article IV of the Constitution provided * * * that "no law shall be amended or revised by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length."

Among the late amendments to the Constitution is the following:

Section 15 of Article VI of the Constitution is hereby amended so as to read as follows:

SECTION 15. The Governor shall appoint as many Justices of the Peace as he may deem necessary. Justices of the Peace shall have jurisdiction in civil actions at law in cases in which the amount or value involved does not exceed one hundred dollars; and in criminal cases their powers shall be fixed by law. Their powers, duties and responsibilities shall be regulated by law. They may hold their offices for the term of four years, subject to removal by the Governor for reasons satisfactory to him."

This section, as amended, we thus find as a whole. The power making the amendment, following the rule prescribed for amending an ordinary act of the Legislature, instead of ordaining in exact language the change desired, states the whole law as it is to be in future giving so much as was embraced in the old section, which was then in force, and which was still to be in force, as well as omitting that which was to be no longer in force, and inserting that which was to be of force instead of that omitted.

The change desired was in the jurisdiction, power and term of office of Justices of the Peace. No change in the manner of appointment is made. Instead of ordaining a section making the changes desired in these respects, and in these only, the law upon the whole subject is inserted as well as to the matter of appointment as otherwise, the purpose being to avoid any doubt as to the intention and scope of the action, and the change or amendment made. We thus have in the section as amended so much of the old law as had been in force, as was then in force, and was to be in force. This is true of such portion of the old section as remained unchanged. As to this portion reinserted, at no time did it cease to be law. It was not repealed and re-enacted; it was continued. That which was omitted from the old section was no longer to be of force, and ceased to be law upon the adoption of the amendment; and that

which was new, and for the first time ordained, was to be in future the law, instead of that taken from the original section. As a consequence from what has been said, Justices of the Peace holding commissions from the Governor, issued under that portion of the old section which was and still is the law, derive their authority and power as justices from the proper constitutional authority, and hence their appointments are still valid, unless the change in the term reaches them.

As it is within the power of the authority in which is vested the power to amend the Constitution to change the jurisdiction, duties and term of office of a constitutional officer, it follows, also, from what has been said, that while the authority to exercise the duties of Justices of the Peace still remains with those appointed under the original Constitution, yet they have such power and jurisdiction only as the amendment confers. As to the extent of the change the old law has ceased to be operative.

The original clause as to the tenure of office of Justices of the Peace provided that they should hold their offices during good behavior, subject to removal by the Governor at his discretion. The amendment provides that they shall hold their offices for the term of four years, subject to removal by the Governor for reasons satisfactory to him. There cannot be a Justice of the Peace holding office for the time prescribed by the old Constitution, or with such tenure, because that provision has ceased to have any effect. There is now no law for any other tenure than that of four years. From what time is this holding to be calculated; when does it begin? The Constitution makes no exception. The same rule must be applied to all Justices of the Peace.

There is nothing in the amendment to save Justices of the Peace in commission under the old tenure from the application of the same rule to their cases as applies to future appointments. What is that rule? When the commission of a Justice of the Peace is signed and sealed, all that is

Executive Communication—Session of Legislature.

necessary to his investiture of the office is complete. Under the practice in this State, all the conditions as to taking oaths, &c., are complied with before the commission issues. To him, upon the signing and sealing the commission, belongs the office. He holds it within the meaning of the Constitution from that date. In the language of the Supreme Court of the United States, "the transmission of the commission to the officer is not essential to his investiture of the office." This I state as a general rule, applicable to officers of this class who accept and enter upon their duties. As a result from what has been said, it follows that all Justices of the Peace who had been in commission for four years at the time this amendment became operative as law, ceased to be such justices, the time for which the law authorized them to hold their offices having then expired.

The other members of the court concur in this conclusion. 19 How. 78; 3 Wis. 671; 3 Gray, 601; 31 Wis. 138; 17 Wis. 651; 20 Texas, 231.

Very respectfully,

JAMES D. WESTCOTT, JR.,
Justice Supreme Court of Florida.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF
NOVEMBER 8, 1875.

1. Section 2 of Article IV of the Constitution of this State authorized annual sessions of the Legislature. This clause was amended, the amendment providing that the section "*is hereby amended so as to read as follows*," inserting a clause authorizing biennial sessions of the Legislature "from and after the first Tuesday after the first Monday in January, 1877."
2. By this action the old section ceased to have any operation, and there was no constitutional authority left for annual sessions. The section as amended became by express language of the amendment the whole law upon the subject. The new section was to be "read" in lieu of the old one.

Executive Communication—Session of Legislature.

EXECUTIVE OFFICE,
TALLAHASSEE, FLA., November 8, 1875. }

To the Honorable Justices of the Supreme Court:

GENTLEMEN: Section 2 of Article IV of the Constitution of this State originally read as follows:

"SECTION 2. The session of the Legislature shall be annual, the first session on the second Monday of June, A. D. 1868, and thereafter on the first Tuesday after the first Monday of January, commencing in the year A. D. 1869. The Governor may, in the interim, convene the same in extra session by his proclamation."

The sixth amendment to the Constitution, adopted by the Legislature and ratified by the people during the current year, reads as follows, viz:

"Section 2 of Article IV of the Constitution is hereby amended so as to read as follows:

"SECTION 2. From and after the first Tuesday after the first Monday in January, A. D. one thousand eight hundred and seventy-seven, the regular session of the Legislature shall be held biennially, commencing on said day and on the corresponding day of every second year thereafter; but the Governor may convene the same in extra session by his proclamation."

I would respectfully request your opinion on the following points, viz:

As the original section which provided for an annual session is repealed by the substitution of the above amendment, and as this amendment makes no provision for any regular sessions until the first Tuesday after the first Monday in January, A. D. 1877, is there any authority for a regular session of the Legislature on the first Tuesday after the first Monday of January, 1876, as would have been the case provided this amendment had not been adopted, or will it be necessary for me to convene the Legislature in extra session in order to secure a session of that body previous to 1877?

I have the honor to be, very respectfully, your obedient servant,

M. L. STEARNS, Governor.

JACKSONVILLE, FLA., November 15, 1875.

To his Excellency the Governor:

SIR: I have the honor to acknowledge the receipt, this day of your communication of the 8th instant, inquiring of the Justices of the Supreme Court whether there is "any authority for a regular session of the Legislature on the first Tuesday after the first Monday in January, 1876," since the adoption of the recent amendment of the Constitution prescribing biennial sessions.

I respectfully reply that the original section 2 of Article IV, which provided for annual sessions of the Legislature, having been abrogated by the amendment, and there remaining no provision anywhere for a regular session in January, A. D. 1876, such session would be unauthorized.

The original section provided that the Governor might convene the Legislature in extra session by his proclamation, and this provision is not changed, but is reiterated by the amendment.

If a session of the Legislature is to be held before 1877, it must be in virtue of such proclamation. I have the honor to remain, very respectfully,

E. M. RANDALL, Chief Justice.

TALLAHASSEE, FLA., November 9, 1875.

His Excellency, M. L. Stearns, Governor of Florida, Tallahassee, Fla.:

SIR: I have before me your communication of this morning. Without stating or repeating the questions, I have the honor to reply:

There are many cases in which the letter of an act of the Legislature is made to yield to the spirit and intention of the law-making power. The rules to ascertain this spirit and intention are, for the most part, simple in their nature. In this case, however, admitting the application of the rule

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to changes in the organic law, the Legislature and the people have, by their action, left nothing to construction. To say that this section, as amended, which is the entire law, authorized a session in January, 1876, would be simple judicial legislation.

In all of the States in which the method of amendment here followed has been adopted, the unvarying rule is that nothing of the old section which is omitted from the new section as enacted, is, in the future, operative as law.

The very purpose of requiring the section, as amended, to be published entire, is to give certainty, by declaring the *whole law*, leaving nothing open for construction.

The Legislature and people, by *expressly omitting* all authority for a session in January, 1876, from the new section, and nothing but the new section being now operative as law, it follows, necessarily, that there is no constitutional sanction for any regular session until the first Tuesday after the first Monday in January, A. D. 1877.

Having had nothing to do with this amendment, I am, as a matter of fact, ignorant of the purposes of its author, if it was other than I have defined it, nor am I sufficiently advised of the opinions of the members of the Legislature to know what may have been their individual views.

As the section, as amended, retains the power of the Governor to call an extra session, this, as a matter of course, is within your Executive discretion.

Very respectfully,

JAMES D. WESTCOTT, JR.,

Justice Supreme Court of Florida.

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The statutes fix the rights of the respective parties to such exchange. Under them the Florida Central Railroad Company was

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authorized to deliver its mortgage bonds to the Jacksonville, Pensacola and Mobile Railroad Company for the purpose of enabling the latter company, through an exchange of these bonds for State bonds, and a sale of the State bonds, to extend its line of road. The increased traffic which it was presumed would come to the Florida Central Company was the consideration for this contract. Upon an exchange of these bonds for State bonds the J. P. and M. Company cannot hold the bonds of the State as its own property, and without a sale of the bonds or an extension of the road occupy the position of a creditor of the Florida Central Company. It is not a bondholder within the meaning of the statute, or entitled to its protection.—*Ib.* 690

CORPORATIONS—When parties—

Where a corporation is a party, it is only necessary to bring the corporation into court by service of process upon such officers as the statute directs. Subordinate agents, employees or officers are not proper parties. The State of Florida *et al.*, vs. the J. P. & M. R. R. Company *et al.*..... 201

CORPORATE AUTHORITIES—Their powers—

The corporate authorities of a town have no right to appropriate the public streets to any other use than that of travel, or right of way, to which they were dedicated, and the convenience of the whole public, and they cannot lawfully obstruct the streets with public or private buildings; and any person whose property is especially injured thereby, may have the aid of the courts of equity to restrain such improper appropriation. *Lutterloh vs. Mayor and Council of the Town of Cedar Keys*..... 307

CONSTITUTION OF THE STATE—Constitution of Article XV—

The sixth section of Article XV of the Constitution of this State reads as follows: "All proceedings, decisions or actions accomplished by civil or military officers, acting under authority of the United States, subsequent to the 10th day of January, A. D. 1861, and prior to the final restoration of the State to the Government of the United States, are hereby declared valid, and shall not be subject to adjudication in the courts of this State." If this is construed as an act of legislation whereby the property of one is transferred to another without due process of law, it is void by the Constitution of the United States; construed as a judicial act, it is void for the want of power in the convention or the people to determine the rights of parties, unheard and without notice. The evident purpose of the convention in adopting this section was to prevent the courts of this State from entertaining suits brought to set aside, reverse or annul any act or decision of officers of the United

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States, acting within the scope of their authority, but it does not control the power of the courts to determine the legal effect of such acts and decisions as evidence affecting the rights of parties, according to the ordinary rule of law. *Dickerson vs. Acosta*..... 614

COUNTY JUDGES—Right to charge for docketing cases—

Chapter 1752 of the Laws of 1870, providing that the Judges of County Courts shall be paid three dollars for each case docketed in their courts, is not repealed by either Chapter 1815 of the Laws of 1870 or by Chapter 1981 of the laws of 1874. *Davidson vs. Seegar*..... 671

CONVEYANCES—Act in relation to recording the same—

The court charged the jury that, if they find from the evidence, that the plaintiff (the grantee of a purchaser at a tax sale) did not put his deed on record until after the purchase by the defendant from one who owned the property before the tax sale, and that the defendant had no notice of the plaintiff's title, and who purchased for a valuable consideration, the plaintiff's title would not prevail. *Held*, that this instruction was erroneous. The act in regard to recording conveyances in this regard relates to conveyances by the same grantor or his grantees, and was designed to protect subsequent purchasers and creditors, and has no reference to a title acquired from other sources. *Billings vs. Stark*..... 398

CONVEYANCES—Wife not joining in—

In an action brought by bill in chancery to subject the real estate of a defendant to sale upon executions to satisfy certain judgments at law, which were obtained upon demands matured and due, such real estate belonged to the defendant, where it appeared that such defendant had conveyed the property to a third person for a consideration equal to its full value, his wife not uniting with him in the conveyance, or relinquishing her right of dower, and the consideration be paid in three notes of the grantee, due in one, two and three years, respectively, without a mortgage back or other security; and when it further appeared that soon thereafter such grantee reconveyed the same premises to the wife of such grantor, for the same expressed consideration, receiving back the three identical notes, a small amount of money and some personal property in payment therefor, without any proof that such notes, money and personal property were her separate property: *Held*, that such property would be deemed the property of her husband; that such deeds would be declared and adjudged null and void, and the real estate, thus attempted to be conveyed, made subject to the lien of such judgment creditors. *Roper et al., vs. Hackney et al.*..... 323

DEEDS—

A deed in the possession of the grantee is presumed to have been duly delivered at the time it bears date. *Billings vs. Stark*..... 397

DOWER—

Where an unmarried man makes a contract to sell real estate, and to execute a deed on payment of the purchase money, and afterwards marries and dies before executing a deed, the right of dower of the widow depends upon the compliance by the purchaser with the terms of the contract.

If the purchaser in such case pays for the land, he is entitled to a conveyance free of the claim of dower, and he may proceed against the heirs and legal representatives and compel a conveyance. *Rain vs. Roper*..... 121

DOWER—Application for by the widow—

The purchaser cannot enjoin the widow's application for admeasurement of dower without showing that he is entitled to a conveyance, and for the purpose of procuring an injunction and compelling a conveyance, the heirs and legal representatives are

necessary parties.—*Ib*..... 121

DOWER—How affected by contracts previous to marriage if purchaser fails to comply—

If he fails to comply, the representative may proceed to compel a specific performance, or for a rescission of the contract. If it be rescinded, the widow will be entitled to dower.—*Ib*..... 121

DOWER—Consideration for the relinquishment of—

A relinquishment of dower by a wife for the benefit of her husband is a sufficient consideration for a subsequent settlement upon her by him; and such settlement is not fraudulent as to creditors of the husband if the relinquishment was obtained upon an express agreement with her that the settlement should be made, and the property settled upon her is a fair equivalent for the dower released. *Nalle & Co. vs. Lively et al*..... 120

DRAINAGE—Swamp and overflowed lands—

Under the provisions of the Internal Improvement law of this State, it is the duty of the Trustees of the Fund to make such arrangements for the drainage of the swamp and overflowed lands as is most advantageous to the fund. *Trustees of the Internal Improvement Fund vs. Gleason*..... 384

DEMURRER—To amend bill—

To an amended bill the defendant has a right to interpose a new demurrer, notwithstanding a previous demurrer to the original bill has been overruled..... 403

DEMURRER—Unknown to chancery practice—

A demurrer to answer in chancery is a pleading unknown to

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chancery practice. After answer the plaintiff must either set the case down for hearing upon bill and answer, except to the answer, or file a replication thereto. This court cannot give effect to such irregularity, and, upon appeal, the judgment must be reversed and the case remanded, with directions to strike the demurrer from the files. *Edwards vs. Drake*..... 666

EXEMPTION—

An exemption of property from sale by process of law is a personal privilege, which may be waived by the owner of the property conveying an interest by means of an absolute or defensible conveyance of property otherwise exempt from such sale. *Patterson vs. Taylor and Randall*..... 337

EQUITY—

A court of equity will not devise some method to recover a debt because of failure to recover the debt through the ordinary legal remedies. *Finegan vs. the City of Fernandina*..... 379

A court of equity will decree performance by a trustee of a contract, when such contract conforms to the law of his trust and his duty as to the improvement of the trust property, and where there is performance by the party with whom the contract is made. *Trustees of the Internal Improvement Fund vs. Gleason*..... 384

EQUITABLE RELIEF—

Both legal and equitable relief may be blended in the same action under the Code. Where the primary relief sought is legal, a case must be made in which the plaintiff is entitled to the final relief prayed, in order to authorize a temporary injunction under the Code in aid of such relief. So an injunction should not be granted to restrain the doing of acts in relation to property, in respect to which property no final judgment is prayed. *Kahn vs. Kahn and Doll* 400

EQUITY—As to return of chattel—

Equity will not decree the return of a particular chattel, unless it is of peculiar value and character. *Bowes vs. Hoeg*..... 403

EQUITIES—Under execution sale—

The general rule is, that the plaintiff in execution, purchasing at a sale under his execution, takes the property subject to such prior liens and equities as affected it in the hands of the defendant in execution when the judgment was recovered. This rule applies to the sale of a franchise under a statutory power. *Holland vs. the State of Florida et al.*..... 435

EVIDENCE—Certificate of the U. S. Direct Tax Commissioner—

A certificate of sale of lands sold by the United States Direct Tax Commissioners, under the act of Congress of June 7, 1862, for unpaid taxes charged thereon, signed by two of the Tax Commissioners, is admissible in evidence in an action brought to try the title to the land. *Hill vs. Vanderpool*..... 128

The certificate of the sale of lands by the United States Direct Tax Commissioners (under the act of Congress of June 7, 1862,) for the non-payment of taxes, is *prima facie* evidence of the regularity and validity of the sale and of the *title of the purchaser*, and a mere assignment by the purchaser of the certificate of sale does not divest him of the title thus acquired, and the assignee of the certificate cannot maintain ejectment in his own name. The title being vested in the purchaser by the tax sale, he can only divest himself of it under the laws of this State, by deed or by will, (if the property is not redeemed by the owner as prescribed by law,) or, the assignee of the certificate may, by complying with the terms of the second section of the acts of Congress of March 3, 1865, (13 Statutes at Large, 501,) obtain a patent from the President of the United States. *Billings vs. McDermott*..... 60

A certificate of the Clerk of the United States Direct Tax Commissioners is not evidence of a sale by them for taxes. *Billings vs. Stark* 297

Either party is entitled to the benefit of any evidence introduced upon the trial by the other party.—*Id.*..... 297

EXECUTOR—Acquires no interest through a purchase at his own sale—

An executor will not be permitted to hold an interest acquired through a purchase at his own sale. If, however, a third person is interested in such bid, a court of equity should not set aside the sale as to this third person in a case where the sale was by commissioners for full value and there was no fraud in fact. *Price et al. vs. Winter* 67

EXECUTION—Sale under—

The court decreeing the sale of the real property of a grantor, upon execution issued upon judgments at law, which it had declared a lien upon the property, his conveyance having been adjudged null and void, cannot authorize the sheriff upon such sale to convey the interests of other than the defendants in execution; nor can it direct the sheriff to put the purchaser of such premises in possession by turning all others out of possession. The purchaser must take such title and right as he may acquire by virtue of the sheriff's sale on execution. *Roper et al., vs. Hackney et al.*..... 323

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EXECUTION—Grounded on the judgment of a competent court—

An execution is a writ grounded on the judgment of a competent court, and cannot issue except upon an order, decree or judgment of such court, wherein the liability of the party is established. *Davidson vs. Seegar*..... 671

EXECUTION—Sale under by a sheriff—

The sale by a sheriff of real property, by virtue of an execution unauthorized by law, and void upon its face, would not cast a cloud upon the title, and a Court of Equity will not interfere to restrain such sale, the law affording complete and ample redress.—*Id.*..... 671

FALSE IMPRISONMENT—Indictment for—

An indictment charging one with having, without lawful authority, forcibly imprisoned another against his will, does not state an offence under Section 43 of Chapter III of "An Act to provide for the punishment of crime and proceedings in criminal cases," approved August 6, 1868. Under that law the acts charged must have been committed "with intent to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State," &c. The Act of 1832, punishing false imprisonment by fine or imprisonment, stands unrepealed. *Ross vs. the State of Florida*..... 55

FORCIBLE ENTRY AND UNLAWFUL DETAINER—

In a proceeding under the act relating to forcible entry and unlawful detainer, the plaintiff claimed that he was lawfully put in possession of the premises by virtue of a writ of possession issued in a former similar proceeding against the husband of one of the appellants; and on the trial, the writ of possession and the proceedings in the former case being produced, and it appearing that no judgment had been entered therein; it is *Held*, that the writ of possession was void, and did not give the plaintiff a lawful possession, or right of possession; and the defendant, having re-entered without force or violence, was not guilty of an unlawful entry. *Stark and wife vs. Billings*..... 318

GUARDIAN—Power of the Judge of Probate—

Under the Constitution of 1839, and the statutes made thereunder, the Judge of Probate had a general power to revoke the appointment of a guardian of the person and estate of an infant. *Simpson vs. Gonzales*..... 9

GUARDIAN—Appointment of by the court, and power of revocation—

Where, pursuant to an understanding between the parties, the appointment of one guardian is revoked and the appointment of

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another made, such proceeding cannot be called in question collaterally. The court having jurisdiction of the subject matter, both the revocation and the appointment are valid; nor it is necessary in such proceedings to give the infant notice, the matter of guardianship being under the exclusive control of the court, the guardian being its officer, and the infant having no right to any particular guardian.—*Ib*..... 9

GUARDIAN—Removal of—

Upon such removal, it is a matter of course for the removed guardian to come to an account, and upon his turning over the estate to his successor, he is not responsible for the subsequent wasting of the estate by such successor.—*Ib*..... 9

GUARDIAN—Process against—

Where service of process is made upon the general guardian of the infant, he appears and makes the defence required by the statute and is heard by the court as the representative of the infant, such action is equivalent to his appointment as guardian *ad Hocem*. *Price et al. vs. Winter*..... 67

HABEAS CORPUS—

Vide Title Criminal Practice.

HOMESTEAD—When granted to a surviving son—

As between tenants in common it is within the power of the chancellor in decreeing partition to direct the Commissioners to assign the share containing the homestead to the surviving son, before that time occupying the homestead, rather than to surviving grandchildren. In such case where the surviving son can retain the property, this action of the chancellor will not be disturbed. If, however, it is established that the assignment of the homestead will result in its going to his creditors, the homestead should be given to the grandchildren, as they should be preferred to creditors of the son. *Bird vs. Bird*..... 424

INFANTS—Sale of interest in estate—

Where there has been a sale of an infant's interest in the estate of his ancestors, and the infant after his majority has knowingly received the amount representing his interest from the party that he is aware made the purchase and claimed title to the interest in the estate, such person so receiving such amount has no equity to recover of the purchaser any portion of the estate for which he has received an equivalent. *Price et al. vs. Winter*..... 67

What essential to the validity of such sale—

It is essential to the validity of the sale of the interest of an infant in the estate of his ancestor that the court making the sale

should so far conform to the statute regulating the proceeding as to acquire jurisdiction of the subject matter and the parties. Over the inheritance of an infant the Legislature has plenary power. It can prescribe the method by which jurisdiction of the infant can be acquired, and conformity to this requirement is all that is necessary.—*Ib.* 67

INJUNCTION—Against the funds of a corporation—

A stockholder, having no claim upon particular funds of a corporation, cannot, as against the action of himself and the corporation, get an injunction upon a claim of property in himself in such funds. *Bowes vs. Hoeg*..... 403

INSOLVENT ESTATES—*Pro rata* payments by—

The third section of "an act to provide for the payment *pro rata* of the debts of insolvent estates," approved January 8, 1853, does not expressly prohibit suit against the executor or administrator of an insolvent estate upon "unauthenticated or admitted claims," and such claims may be established by suit, the judgment thereon to be enforced or collected in the manner provided in that act for the collection of other claims against the estate. *Wilson and Wilson vs. Broward*..... 587

INJUNCTION—Will not lie for trespass or withholding chattels levied on by sheriff—

A bill in equity for an injunction will not lie for a mere trespass or wrongful withholding of chattels levied on by a sheriff under a void execution, the remedy being entirely adequate by a suit at law. *Davidson vs. Floyd*..... 667

INJUNCTION—Not to restrain an appeal—

A defendant cannot, through the process of injunction, be prevented from appealing in a case where, under the Constitution and laws, he has a clear right to appeal, nor should a perpetual injunction be granted without notice or hearing, which in effect determines rights involved in the issues in the cause. *The State of Florida vs. the J. P. & M. R. R. Company et al.*..... 201

INJUNCTION—To execution of a decree of foreclosure of a mortgage—

An original bill, filed for the purpose of enjoining the execution of a decree of foreclosure of a mortgage upon the ground that a defence existed of which the defendant neglected to avail himself, or which may have been denied by the court, cannot be sustained. *Michel vs. Sammis* 308

INJUNCTION—As to sale for taxes—

Equity will not enjoin the sale of property for taxes on account

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of irregularities in the matter of notice of time and place of sale.
 Finegan vs. the City of Fernandina..... 379

INJUNCTION—On affidavit by counsel—

To justify allowing an injunction where the affidavit to the bill is by counsel, it must be such an affidavit as does not leave it to the counsel to determine for himself what facts he swears to. Where such an affidavit is positive and direct to no material allegation in the bill, an injunction should not be granted. Bowes vs. Hoeg..... 403

JUDGE—Acting as attorney, as an attorney when not disqualified—

Representing as attorney a third person not a party to a suit in proceedings against a receiver in said suit, does not disqualify such person from hearing as judge the case between the parties, when the equities of such case are independent of the rights and not connected with the case of such third person. State of Florida *et al.* vs. the J. P. & M. R. R. Company *et al.*..... 201

JURISDICTION—Of Circuit Courts, as to possession of real estate—

The Circuit Court, under the Constitution, has jurisdiction of all actions relating to the possession and the right of possession of real estate, to be exercised in such form as the Legislature may prescribe. Stark and wife vs. Billings..... 318

JURISDICTION—Of the County Court—

Under the Constitution of 1868, and the statutes thereunder, the County Court has no jurisdiction to enter and enforce a general judgment against a guardian for a sum in excess of its ordinary civil jurisdiction. Simpson vs. Gonzales *et al.*..... 9

LAND SALES BY THE U. S. DIRECT TAX COMMISSIONERS—*Prima facie* evidence of title—

The certificate of the sale of lands by the United States Direct Tax Commissioners (under the act of Congress of June 7, 1862,) for the non-payment of taxes, is *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser, and a mere assignment by the purchaser of the certificate of sale does not divest him of the title thus acquired, and the assignee of the certificate cannot maintain ejectment in his own name. The title being vested in the purchaser by the tax sale, he can only divest himself of it, under the laws of this State, by deed or by will, (if the property is not redeemed by the owner as prescribed by law,) or the assignee of the certificate may, by complying with the terms of the second section of the act of Congress of March 3, 1865, (13 Statutes at Large, 501,) obtain a patent from the President of the United States. Billings vs. McDermott..... 60

Vide Hill vs. Vanderpool..... 128

LANDS—Proceeding for the sale of lands of a decedent—

In proceedings for the sale of the lands of a decedent, the statute of this State does not require the service of process upon an infant heir or devisee in order to acquire jurisdiction. The statute requires the court to appoint a guardian for such of the heirs or devisees as are infants, and this is essential. *Price et al. vs. Winter*..... 66

Such proceedings a judicial sale—

A sale of the land of a decedent under such proceedings is a judicial sale. If the court has jurisdiction of the subject matter and the person, a purchaser at such sale cannot be affected by irregularities of errors in the proceedings. Such errors may be corrected upon appeal. They cannot be corrected in a collateral proceeding.—*Ib.*..... 66

LIEN FOR RENT ON CROPS—

A lessor of land, the lease being in writing, has no lien for rent upon the crops of the tenant under the provisions of "an act for the relief of landlords," (Chap. 1498, Laws of 1865-6.) until a warrant of distress is issued according to the provisions of that act. *Patterson vs. Taylor and Randall*..... 336

LIEN—Of a mortgagee on personal property—

A mortgage of personal property does not release the property from the lien of his mortgage by his mere silence on being informed that a portion of the property has been disposed of by the mortgagor and delivered to another creditor. His assent to the delivery or other disposition of the mortgaged property might operate to release it so as to protect a third party.—*Ib.*..... 336

LIENS—Under execution—

The general rule is, that the plaintiff in execution, purchasing at a sale under his execution, takes the property subject to such prior liens and equities as affected it in the hands of the defendant in execution when the judgment was recovered. This rule applies to the sale of a franchise under a statutory power. *Holland vs. the State of Florida et al.*..... 455

LIMITATION—On the power of the State to pledge the credit thereof—

A limitation upon the power of the Legislature in the matter of pleading the credit of the State to aid quasi public works, such as railways, should be strictly construed, and an act of the Legislature authorizing an issue of State bonds in aid of a line of railway differing essentially and fundamentally from the line to which the power thus to aid was limited by the Constitution, is in this respect unconstitutional and void. *Holland vs. the State of Florida*..... 455

MANDAMUS—When it does not lie to compel a Judge to hear a cause—

Where a Judge has determined that, under the statutes of this State, he is disqualified from hearing a cause, *mandamus* does not lie to make him reverse that decision and to hear the cause. State of Florida *ex rel.* P. & L. R. R. Company vs. VanNess, Judge of the First Judicial Circuit..... 317

MINUTES OF THE COURT—Entry—

This entry in the minutes, "Verdict for plaintiff; let writ issue," is not a judgment, and execution thereon is void. Stark and wife vs. Billings..... 318

MORTGAGE—Presumption of payment—

Where a mortgage was given to secure a promissory note, payable in four months, and no suit brought until fully nineteen years after the note became due, and no proof that any portion of the principal or interest had ever been demanded, and the mortgagor having died, the note and mortgage not being found among his effects, and the administratrix, the widow of the mortgagee, never having had any knowledge of their existence, and there being no proof tending to show what had become of the note and mortgage, the administratrix not bringing suit until after this long time had elapsed on being informed that the mortgage was not cancelled of record; upon answer of payment, *held*: that payment would be presumed on account of the lapse of time and other circumstances shown. Buckmaster vs. Kelley *et al.*..... 180

MORTGAGE—Undivided interest in land cannot be partitioned—

Upon foreclosure of a mortgage upon an undivided interest in lands, the court cannot make a decree of partition of the lands among the several owners and claimants.—*Id.*..... 180

MORTGAGEE—His equitable interest—

A mortgagee has no equitable rights growing out of his mortgage lien to have a receiver of the estate of the mortgagor beyond the property embraced in the mortgage. The receivership should not be extended to other property in the possession of and claimed by third persons. The State of Florida *et al.* vs. the J. P. & M. R. Company *et al.*..... 201

MORTGAGE—

Taylor mortgaged to Patterson certain personal property, including a growing crop, to secure advances of goods, etc., to enable Taylor, a planter, to make and gather the crop. The mortgage debt not being paid, Patterson commenced suit to foreclose the mortgage, whereupon the mortgagor interposed a defence that the

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mortgaged property had been selected and set apart to him as "exempt from forced sale under any process of law:" *Held*, that the term "forced sale," as used in the Constitution, is a sale against the will of the owner, and not a sale to which he had expressly consented by giving the mortgage; that having thus, for a valuable consideration, given his consent to the alienation of the property, upon his breach of the condition of the mortgage, he is estopped from revoking it; and the court, in ordering a sale, does but decree a specific performance of the agreement, which agreement was not forbidden by law.

A mortgagee of personal property does not release the property from the lien of his mortgage by his mere silence on being informed that a portion of the property has been disposed of by the mortgagor and delivered to another creditor. His assent to the delivery or other disposition of the mortgaged property might operate to release it so as to protect a third party. *Patterson vs. Taylor and Randall*..... 336

An objection to the terms of the mortgage by the mortgagor, before signing, that it included property which he desired to reserve and use in paying a debt to another, cannot vary the legal effect of the mortgage.—*Id.*..... 336

MORTGAGE—Who entitled to the possession—

The statutes of this State provide that the mortgagor shall be entitled to the possession of the mortgaged property until after decree of foreclosure and sale; that the mortgage is a "specific lien" upon property, and that the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding and outbidding all competitors in market. An execution purchaser of the equity of redemption takes the land subject to the equitable rights of the mortgagee against the mortgagor. The possession which the law allows the mortgagor, as well as such purchaser, is subordinate to the equitable rights of the mortgagee. The right to possession exists *cum onere*. Non-residence and insolvency of the mortgagor, a failure on the part of the execution purchaser in possession as well as of the mortgagor to keep down the interest of the mortgage debt, and clear inadequacy of the mortgaged premises to pay the debt, are equities by which the court can affect the conscience of the party thus in possession. The mortgage is in equity a charge upon the land and its produce, and under these circumstances a receiver of the rents and profits should be appointed upon bill seeking foreclosure and sale. *Pasco vs. Gamble and Poole*..... 562

NOTICE—When given by an attorney—

It is within the power of the Legislature to authorize notice of the institution of a suit to be given by an attorney or party, instead of through a writ issuing out of a court. *Gilmer vs. Bird*..... 410

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NUISANCE—Public and private—

The erection of a building in the centre of a street sixty feet wide, to be used for a market for meat, fish, &c., and as a pound for confining swine and other animals and as a jail, in front of places of business or private residence, would be both a public and private nuisance, and the courts of equity will interfere to prevent or abate it in behalf of any one likely to sustain an injury thereby. *Lutterlogh vs. the Mayor and Council of the town of Cedar Keys*..... 307

OATH—Form of administered to a jury—

A form of oath administered to a jury in a civil action containing matter not embraced in the issue, which was not objected to by either of the parties, will not be considered as error, unless it is evident that the jury were misled thereby. *Stark and wife vs. Billings* 318

PARTIES—When a corporation is a party—

Where a corporation is a party it is only necessary to bring the corporation into court by service of process upon such officers as the statute directs. Subordinate agents, employees or officers are not proper parties. *Broward vs. Hoeg*..... 370

In an action brought by H. against M. B. as administrator of the estate of C. B., to foreclose a mortgage on real estate given by C. B. in his lifetime, the defendant in his answer alleging that C. B. held the land in trust for certain other persons, it appearing in the record that H. was a bona fide purchaser by mortgage for a valuable consideration without notice of such trust, eight years having elapsed between the acquisition of the title by C. B. and the commencement of the action for foreclosure: *Held*, that it was not necessary to make the alleged beneficiaries parties defendant in the action.

Prior incumbrances as mortgagees are not necessary parties in an action to foreclose a subsequent mortgage.—*Id.*..... 370

Where the specific performance of such a contract is sought, affecting to a great extent the interests of the *cestui que trust*, they should be parties to the suit. Trustees of the Internal Improvement Fund vs. Gleason..... 384

PRACTICE—

When a bill of complaint contains such a variety of subjects of litigation not proper to be joined, and of parties not properly joined,

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and as to some of the matters other parties are necessary, the court may, *sua sponte*, dismiss the bill as multifarious, whether the bill be or be not demurred to for such causes.

A bill in equity to set aside a deed or mortgage cannot be sustained without the presence of the grantee or mortgagee; and with such matters cannot be joined a demand for rents and profits.

A demand for rents and profits, or for use and occupation, cannot be recovered in a suit in equity for a partition.

A decree of partition cannot be had while the premises are held adversely by other parties. The legal title must be first established.

Equity is not the proper forum nor a bill in partition the proper action for trying the legal title to lands. *Mattair et al. vs. Payne et al.*..... 683

Appeals—When prosecuted—

A person claiming to succeed to and represent the interests of a defendant against whom a judgment has been rendered, cannot, by simply filing a statement and exhibits showing such claim, prosecute an appeal to this court in his own name, there having been no action by the court rendering the judgment making him a party. The general rule is that a person has no right to appeal until some question to which he was a party has been adjudicated by the court of original jurisdiction. *The State of Florida et al. vs. the Florida Central R. R. Company et al.*..... 690

When a Plaintiff may Dismiss his Bill—

A plaintiff may dismiss his own bill, with costs, at any time before decree. Where the order is to discontinue at "plaintiff's costs," it is the duty of the party to whom costs are awarded to furnish his bill or procure his costs to be taxed.—*Ib.*..... 690

PARTIES—In Appellate Court—

The simple filing of letters testamentary after a final judgment against her testator does not enable an executrix to prosecute an appeal from the judgment. She must be made a party in the court below to give her a standing as an appellant in the court.—*Ib.*..... 690

A County Judge, as a Judge of Probate, has no authority to issue an execution for costs and fees, except upon a judgment or order establishing the liability of the party and the amount due. *Davidson vs. Floyd.*..... 667

PRACTICE—Demurrer to an answer unknown to chancery practice—

A demurrer to an answer in chancery is a pleading unknown to chancery practice. After answer the plaintiff must either set the

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case down for hearing upon bill and answer, except to the answer, or file a replication thereto. This court cannot give effect to such irregularity, and, upon appeal, the judgment must be reversed and the case remanded, with directions to strike the demurrer from the files. *Edwards vs. Drake*..... 666

PRACTICE—

Where facts material to the plaintiff are embraced in the issues made by the pleadings of the defendant, it is error to enter a final decree for the plaintiff without evidence, without a hearing, and without a default. So also is it error to make a final decree against a defendant upon the allegations of a complaint and *ex parte* affidavits, without service of process, without notice, and without opportunity for hearing. *State of Florida et al. vs. the J. P. & M. R. Company et al.*..... 201

Copies of detached papers, severally certified to be copies of papers filed, and of minutes of the court, purporting to pertain to a cause, are not proper evidence of the proceedings and judgment when offered for the purpose of showing a judgment. The process, pleadings, proceedings, entry of verdict and final judgment, forming the complete judgment record, or a copy thereof certified to be such record, and the whole thereof, should be produced.

This entry in the minutes, "Verdict for plaintiff; let writ issue," is not a judgment, and execution thereon is void. *Stark and wife vs. Billings*..... 318

PRACTICE, CRIMINAL—Accessory to a murder; plea in abatement—

The accused being indicted as accessory to the murder of Ellen Wells by William Newton, pleaded in abatement that the certificate of the Chairman of the Board of County Commissioners had not been recorded together with the list of persons selected by the board as required by law, from which juries are required to be drawn: *Held*, that the omission of the Clerk to record the certificate did not constitute an irregularity in the drawing, summoning or empaneling of jurors. *Keech vs. the State of Florida*..... 591

Accessory—Cannot be tried before the principal offender is tried—

One charged as an accessory before the fact, in an indictment for felony, cannot, by law, be tried before the principal offender is tried, but both may be tried upon one indictment.—*Ib.*..... 591

Act of 1875 Reducing Number of Grand Jurors—

Since the date of "an act to amend section 5, chapter 1628, Laws of Florida, reducing the number of grand and petit jurors," approved February 20, 1875, not more than fifteen persons should be summoned and sworn on a grand jury. The purpose of the act

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was to reduce the number of grand jurors, and its effect was to repeal so much of the existing law as required a greater number to be sworn.—*Ib.* 591

Second Count in the Indictment should contain all the Facts—

A second or subsequent count in an indictment should contain a statement of all the necessary facts and allegations to charge the offense. A reference to a former count for the purpose of supplying a material statement is not sufficient.—*Ib.* 591

Deficiency in Number of Jurors—How supplied—

The twenty-first section of the act of 1868, relating to jurors, provides that when a sufficient number of jurors duly drawn and summoned cannot be obtained, the court shall cause jurors to be summoned "from the bystanders or from the county at large." The court ordered a deficiency to be supplied "from the bystanders or from the county at large," thus making the order in the alternative form: *Held*, that the mode of supplying the deficiency in either or both ways is left to the discretion of the court, and there was no irregularity which could work an injury to the accused.—*Ib.* 591

Deficiency in the Panel—How supplied—

After the jury had been sworn, but before any testimony had been taken, one of the number was found to be an alien who had not taken any step toward naturalization, and was one of a class prohibited by the constitution from being a juror. The court discharged him and had his place supplied with a competent person: *Held*, not irregular. In such case the entire jury should be sworn anew.—*Ib.* 591

Witness—A principal offender competent—

A principal offender is, before judgment of conviction of felony, a competent witness against an accomplice or accessory in the same crime.—*Ib.* 591

Recommendation to Mercy—Effect thereof—

In "capital" cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life (Act of February 27, 1872, Chap. 1877.) It is held not to be error if the court omit to inform the jury of this law, unless specially requested to do so.—*Ib.* 591

In Indictment for Murder—Location of the wounds must be stated—

In an indictment for murder, the part of the body upon which the injury was inflicted should be stated. The dimensions of an incised wound should also be given.—*Ib.* 591

Habeas Corpus—Writ of error in a habeas corpus proceeding—

The granting of a writ of error to a judgment in a *habeas corpus* proceeding, is a matter of discretion in this court. The proceeding

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is *ex parte*, not requiring notice unless so directed by the court. A petition setting forth the nature of the case, accompanied by a certified copy of the record, is the proper basis for such motion. *Ex parte Finch*..... 630

A Party Indicted for Murder entitled to a Writ of Habeas Corpus—

A party indicted for murder is entitled, upon proper application, to a writ of *habeas corpus* for the purpose of showing such facts as may satisfy the court that the proof is not strong or the presumption is not great that he is guilty of a capital offence, and that he is entitled to be discharged on bail. The indictment charging a capital offence is not conclusive upon such application, under the statute, as to the character of the testimony. *Holley vs. the State of Florida*..... 668

Misdemeanor—

Previous to the constitutional amendments of 1875, the Circuit Courts had no jurisdiction to try a party charged with a misdemeanor, except upon appeal from the county court, and a judgment of the Circuit Court upon a conviction for a misdemeanor tried upon indictment in the court, was void. *Kennedy vs. the State of Florida*..... 635

Assault with Intent to Kill—

An indictment charging "an assault with intent to kill," charges a misdemeanor under an act of February 10, 1832, the penalty not being imprisonment in the State prison; and the offence is not included in the provisions of Section 46, Chapter 3 of the Criminal Code of 1868.—*Ib*..... 635

In Capital Cases—The Judge should ask the prisoner whether he has anything to say—

In capital cases, before pronouncing sentence, the Judge should ask the prisoner whether he has anything to say why the sentence of the law should not be pronounced against him, and this should appear on record. But the omission of this ceremony is not ground for a new trial, but only for setting aside the judgment or sentence already pronounced, to the end that it may be properly observed and judgment regularly pronounced.—*Ib*..... 591

Principal in a Murder—As witness against the accessory—

The accused was indicted for murder, and another person as an accessory; the accessory being tried first, the principal was used by the State as a witness against the accessory, who was convicted. On

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being arraigned for trial the principal pleaded that he was entitled to be discharged, on the ground that he had been used as a witness against, and secured the conviction of, the accessory. *Held*, that the plea was bad; such matters should be addressed to the Executive power of pardon, and not the courts. *Newton vs. the State of Florida* 610

Accused Designated by a Different name—

It is alleged that according to the evidence the name of the person killed was Ellen Keech, and not Ellen Weila, as charged in the indictment, and that judgment should be arrested for that cause. *Held*, that though there was some confusion in the evidence as to the true name, yet it was for the jury to determine as to the identity of the person named in the indictment and the proofs. It is generally sufficient to give the name by which the person is usually known.—*Id.* 610

Habeas Corpus—

When a person is indicted for murder or other capital offense, he is entitled, upon *habeas corpus*, to produce such evidence as may operate to convince the court that the offense is of such grade, or that there are such strong doubts in the case that a jury should not, upon the case as presented, convict of a capital offense for the purpose of being discharged on bail. *Finch vs. the State of Florida*..... 611

RAILROADS—Construction of special franchises according to the charter—

The duration of a franchise or right granted by the Legislature to a corporation is fixed by the constitution operative at the time of the enactment, or by the enactment itself. The rights passing to the Atlantic & Gulf Railroad Company under the act of 1866, are co-existent with the franchise to be a corporation therein granted.

The charter of a railroad company providing "that the said railroad and its appurtenances, and all property therewith connected, shall not be taxed higher than one half of one per cent. upon its annual net income," is a contract between the State and the company, the obligation of which cannot be impaired by subsequent action of the State. *Atlantic & Gulf Railroad Co. vs. Allen*..... 617

RAILROADS, BRANCH—When exempt from taxation—

Upon the amendment of a charter of a railroad company (whose road was thus exempt from taxation) authorizing it to construct a branch road, the branch road, when constructed, became subject to the provisions of the original charter, and the right of exemption from taxation therein granted attached with full force to the branch road.—*Id.* 617

RAILROADS—Sale thereof carries exemption from taxation—

A statute providing that "all rights" as to a line of railway which "are and have been legally vested" in one corporation shall

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pass to another corporation upon a sale by one to the other, is sufficiently clear and certain to pass a right of exemption from taxation, if such right exists in the vendor company at the time of sale.—*Ib.* 637

RAILROADS—Act of January 6, 1855, construed in relation to exemption from taxation—

The railroads exempted from taxation under the 18th section of the act entitled "an act to provide for and encourage a liberal system of internal improvements in this State," approved January 6, 1855, were such roads only as were a part of the State system thereby created, and the railroad from Live Oak, Florida, to Lawton, Georgia, was not embraced therein. This section of that act construed.—*Ib.* 637

REHEARING OF A CAUSE—By bill of review—

A supplemental bill, in the nature of a bill of review, and not a petition for rehearing, is the proceeding by which a defendant after final decree pronounced, but not entered or recorded, may have a rehearing of the original cause, and a hearing of new matter or facts discovered since publication. The office of a petition for rehearing under the statute considered and defined. *Finlayson vs. Lipscomb*..... 558

RAIL ROADS—Under the system of Internal Improvements by the Laws of Florida—

Where the line to which aid was authorized to be extended by the Constitution was part of a *State system*, having its several termini at points within the State, a line of railway, embracing a part of the system but having one of its terminal points on the boundary line of another State, looking to a connection with the ports of another State, is a line of railway essentially and fundamentally differing from the line to which aid was authorized to be extended. *Holland vs. the State of Florida*..... 499

RECEIVERS—

As a general rule, a receiver appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject matter by the same court in a subsequent suit. The receivership in the first suit should be extended to the second, subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receiverships were granted. If, however, a different receiver is appointed, then, if the court has jurisdiction of the subject matter and parties, and is the same court which made the first appointment, the receiver in the first suit must deliver to the receiver appointed in the second. *The State of Florida et al. vs. The J. P. & M. R. R. et al.*..... 201

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Where an serious injury to the property involved in controversy can result from the delay, notice should always be given before a receiver is appointed. A case of great urgency should be made to appear to justify such an appointment without notice, and whenever an injunction or restraining order is sufficient to protect the rights of the plaintiff no receiver should be appointed. The appointment of a manager of a line of railway is an extraordinary exercise of power. Such appointments should be made only in extreme cases clearly justifying such such action.

Under the Constitution and laws of the State of Florida, a receiver cannot be appointed by the judge of one circuit to take possession of property in another.—*Id.*..... 381

RECEIVER—When appointed on petition and on amended bill—

Where the bill fails to set forth these equities, and requests to pay for a receiver or for any segregation of the rents and profits, it is not conformable to chancery practice to appoint a receiver upon petition without amendment of the bill. A petition in such case cannot be attended to in the matter of appointing a receiver as setting up substantial equities not otherwise alleged or claimed in the pleadings. The plaintiffs must amend their bill to make these equities available. *Pines vs. Gamble and Peale*..... 398

SHERIFF'S SALE ON EXECUTION—What title takes—

The court decreeing the sale of the real property of a grantor upon execution issued upon judgments at law which it has reversed a lien upon the property, his conveyance having been adjudged null and void, cannot authorize the sheriff upon such sale to convey the interests of other than the defendants in execution; nor can it direct the sheriff to put the purchaser of such premises in possession by turning all others out of possession. The purchaser must take such title and right as he may acquire by virtue of the Sheriff's sale on execution. *Roper et al. vs. Hackney et al.*..... 393

SHERIFF'S SALE—Under act of Congress, March 2d, 1867, and July 19th, 1867—

Under the act of Congress of March 2, 1867, entitled "An act for the more efficient government of the rebel States," and the act of July 19, 1867, amendatory thereof, the officer commanding the military district in which Florida was embraced was authorized to suspend a sheriff in the exercise of his power to sell property under execution. *Purviance vs. Broward*..... 375

SET-OFF—Taxes not a subject of—

Equity will not enjoin the collection of taxes by a municipal corporation from the property of its creditor until the debt due by the

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corporation to such creditor is paid. A tax is not the subject matter of set-off. *Finnegan vs. The city of Fernandina*. 379

STATE CREDIT—Power of the Legislature to pledge the credit of the State—

A limitation upon the power of the Legislature in the matter of pledging the credit of the State to aid *quasi* public works, such as railways, should be strictly construed, and an act of the Legislature authorizing an issue of State bonds in aid of a line of railway differing essentially and fundamentally from the line to which the power thus to aid was limited by the Constitution, is in this respect unconstitutional and void. *Holland vs. The State of Florida*. 455

STATE—Not to be joint owner in any companies—

The State is prohibited by the Constitution from becoming "a joint owner or stockholder in any company, association or corporation." The State may grant such franchises to others. She cannot herself purchase, own, or operate a line of railway.—*Id*. 455

SUMMONS—As authorized by the code—

The summons authorized by the Code is not process within the meaning of that clause of the Constitution which requires that "the style of all process shall be 'the State of Florida.'" *Gilmer vs. Bird* 410

SUPERINTENDENT OF SCHOOLS—

The County Superintendent of Schools has no authority to purchase and pay for lands for school purposes without being authorized by the County Board of Instruction, and money paid by the Treasurer upon the order of the Superintendent for land purchased without such authority may be recovered by the County Board as a corporation, in an action for money had and received. *Board of Public Instruction for Nassau County, vs. Billings*. 687

SURETIES—Co-sureties on a promissory note—

Between co-sureties upon a promissory note, the relation of debtor and creditor does not exist without payment of the debt by one of the sureties. Such relation cannot be called a claim within the meaning of the statute of non-claim in this State. *May vs. Vann*. 553

SURETIES—Attorneys not to be in appeals—

An attorney of the Circuit Court is prohibited from being security in an appeal, and a violation of the rule will result in its dismissal. *Sedgwick vs. Dawkins*. 572

TAXES—Collection of direct taxes under act of Congress June 7th, 1862.

The eighth section of the Act of Congress of June 7, 1862, for the

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collection of direct taxes in insurrectionary districts, provided that the owner might, at any time within one year after a sale of lands, prove to the satisfaction of the Commissioners that they belonged to a certain class of persons, and that they had been unable, by reason of the insurrection, to pay the taxes or redeem the lands from sale within the time limited for paying or redeeming the same, in which case the Commissioners were authorized to allow a further time to redeem the same, not exceeding two years from the time of sale; and any party interested may appeal from the decision of the Commissioners to the District Court of the United States. The plaintiffs, whose lands had been sold for taxes, applied to the Commissioners and made certain proofs, whereupon the Commissioners made an order that satisfactory proofs required by statute having been made, the plaintiffs were entitled to redeem within the two years from the day of sale of their lands; and the plaintiffs within the two years redeemed the lands from sale—all which appeared by the records of the Board of Tax Commissioners; and no appeal was taken from their decision to the District Court. The defendant now claiming that the plaintiffs were not entitled to redeem the lands sold, it is *held*, that the Board of Tax Commissioners were made by law the judges of the sufficiency of the application and the proofs, and their order standing unreversed, it is conclusive, the courts of the State having no power to review that judgment. The redemption by the plaintiffs extinguished the certificate of sale. *Soutter and McRae vs. Miller*..... 683

TITLE TO REAL ESTATE—Clouds upon the title—

Where an action cannot be sustained upon a conveyance, in the absence of rebutting proof, it cannot be said to be a cloud upon the title. *Davidson vs. Seegar*..... 671

TAXES—The collection of direct taxes, under act of Congress—

Under the act of Congress of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, which provides that unless the taxes therein mentioned shall be paid within sixty days from the time of levying the same, the title to the property taxed shall "become forfeited" to the United States, there was no effectual forfeiture until a sale had been made pursuant to the act. The act was designed to be a measure of revenue.

The seventh section of the Act of Congress of June 7th, 1862, providing for the collection of direct taxes in the insurrectionary districts, declares that the certificates of sale for taxes "shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser under the same;" and further, "that the certificate of the Commis-

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sioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act." *Held*, that the act should be so construed that the owner of lands sold for said taxes may show, for the purpose of defeating the certificate of sale, that no tax had been legally assessed, or that any other step necessary to be taken by the Commissioners had not been taken, and, thus, that they were without power to make the sale; and that all their essential proceedings which were not conformable to law were of no legal force to affect the title to the property. *Dickerson vs. Acosta*..... 614

TAX COMMISSIONERS—

A tax levied by the Direct Tax Commissioners of the United States, in 1863, in Nassau county, while a small portion only of the county had been subject to the military authority of the United States, was not authorized by the Act of Congress. The Tax Commissioners were not empowered to enter upon the discharge of their duties until the commanding General of the forces of the United States had established the military authority of the United States *throughout* the county.—*Id.*..... 614

TAX COMMISSIONERS—Sales by, under direct tax, of act of Congress June, 1862—

By the act of Congress of June 7, 1862, for the collection of direct taxes in insurrectionary districts, "the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid * * * shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever." Under this provision, where the plaintiff shows title under a certificate of sale by the tax commissioners, the evidence of the defendant's good title anterior to the tax assessment and sale, or of a title by deed from the former owner, is not a defence. *Billings vs. Starke*..... 296

TAX SALE CERTIFICATE—How far evidence—

The neglect or refusal of one of three forming a board of United States Tax Commissioners to act, or his dissent from the proceedings of the majority, will not invalidate the act of the majority; and a tax sale certificate signed by two of the commissioners is "*prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser;" and this having been held by the Supreme Court of the United States, construing an act of Congress, is conclusive upon the State courts.—*Id.*..... 296

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TAX SALE—Cannot be set aside by officers of the Treasury Department—

There is no power vested by law in the officers of the Treasury Department to set aside a sale, or vacate a title acquired by a purchaser at a sale, for direct taxes; and the assent of the purchaser to the setting aside of the sale, after he had conveyed the premises to a third person, cannot affect the rights of such third person, unless he also assented.—*Id.*..... 296

TENANTS IN COMMON—

Crops grown upon the common estate by one tenant in common of the land, vest in and become the property of the occupying tenant. The other co-tenants have no property in such crops. In cases of exclusion, where there is a liability of the occupying tenant, it extends only to an accounting for what he has received beyond his first share. There is no property or lien in the produce.

As between tenants in common it is within the power of the chancellor in decreeing partition to direct the commissioners to assign the share containing the homestead to the surviving son, before that time occupying the homestead, rather than to surviving grandchildren. In such case, where the surviving son can retain the property, this action of the chancellor will not be disturbed. If, however, it is established that the assignment of the homestead will result in its going to his creditors, the homestead should be given to the grandchildren, as they should be preferred to creditors of the son. *Bird vs. Bird*..... 424

TESTIMONY—In Criminal Practice—

The act of 1870, entitled "An act concerning testimony," gives to the accused in all criminal prosecutions the right to make a statement, under oath, before the jury, of the matter of his or her defence, and does not make the accused a witness in the case, or subject him to the rules governing in the examination of witnesses.

Such statement, when so made, is for the jury alone, and to be taken by them into consideration in connection with all the evidence of the case, and to be allowed such weight, and such only, as they, in their judgment, may see fit to give to it.

It is not sufficient, in a case of perjury, for the court to charge the jury "that if they believed, from the testimony, that the accused took the oath, and that it was false, he was guilty." The court should charge that they must find that the accused took a willfully false oath, and that it must be so taken in relation to matter material to the issue, in order to make him subject to the punishment provided for perjury. *Miller vs. the State of Florida*..... 577

TRUST—Deeds of, when not a mortgage—

The deed of trust executed by the Florida Railroad Company to Soutter and McRae, as Trustees, conveying certain lands and lots in trust, to sell and convey the same by deeds of conveyance, and to devote the proceeds to the payment of liabilities of the company, is not a mortgage, but vests the legal title in the Trustees, and they are the proper parties to protect the title of such lands as remain unconveyed by them. *Soutter and McRae vs. Miller*..... 625

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND—
Drainage of swamp lands—

Under the provisions of the Internal Improvement law of this State, it is the duty of the Trustees of the Fund to make such arrangements for the drainage of the swamp and overflowed lands as is most advantageous to the Fund. *Trustees of the Internal Improvement Fund vs. Gleason*..... 384

WRIT OF ERROR—No limitation as to time—

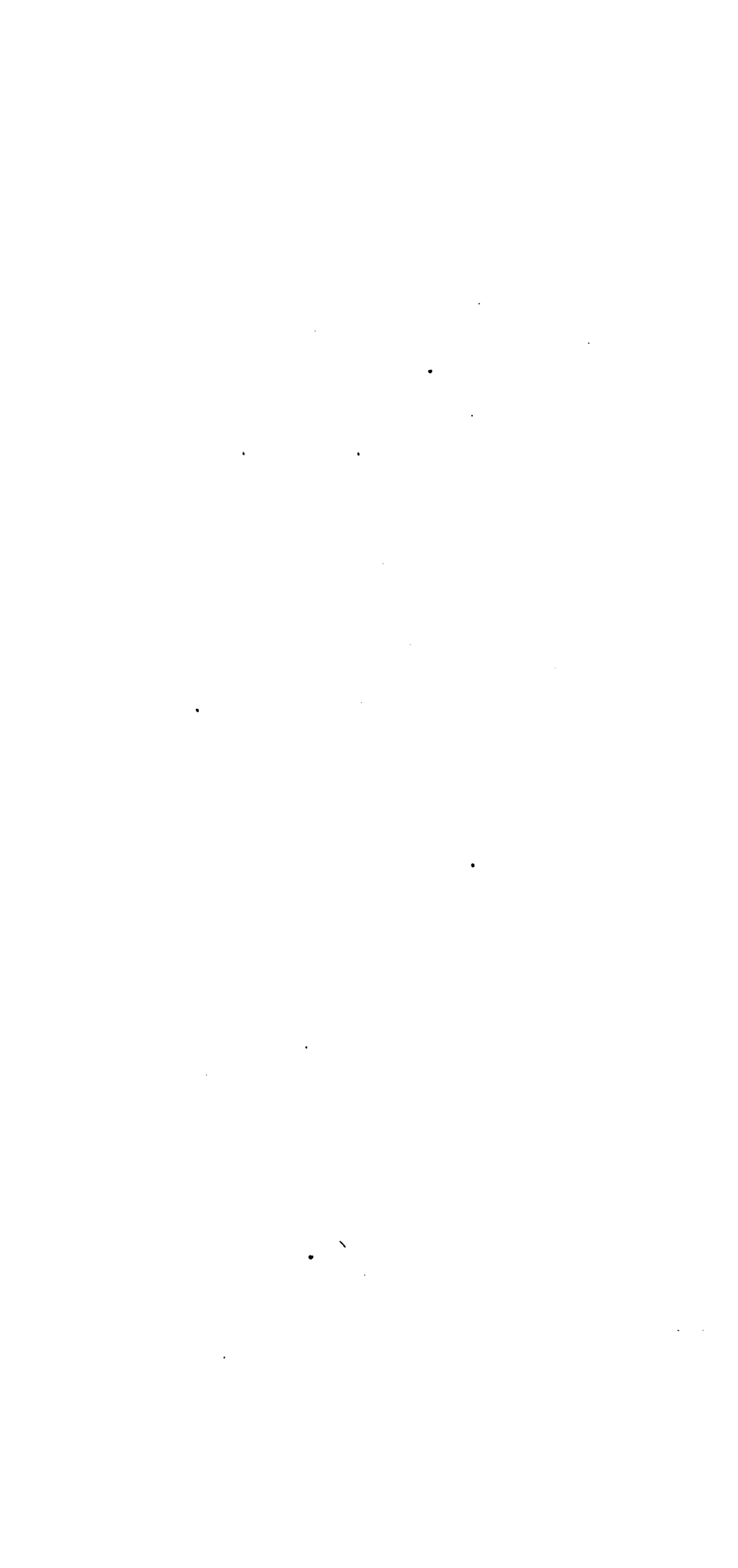
By the statute of this State there is no limitation of the time within which a party convicted of a crime may have a writ of error; and such a writ may be had after the actual execution of the judgment or sentence.

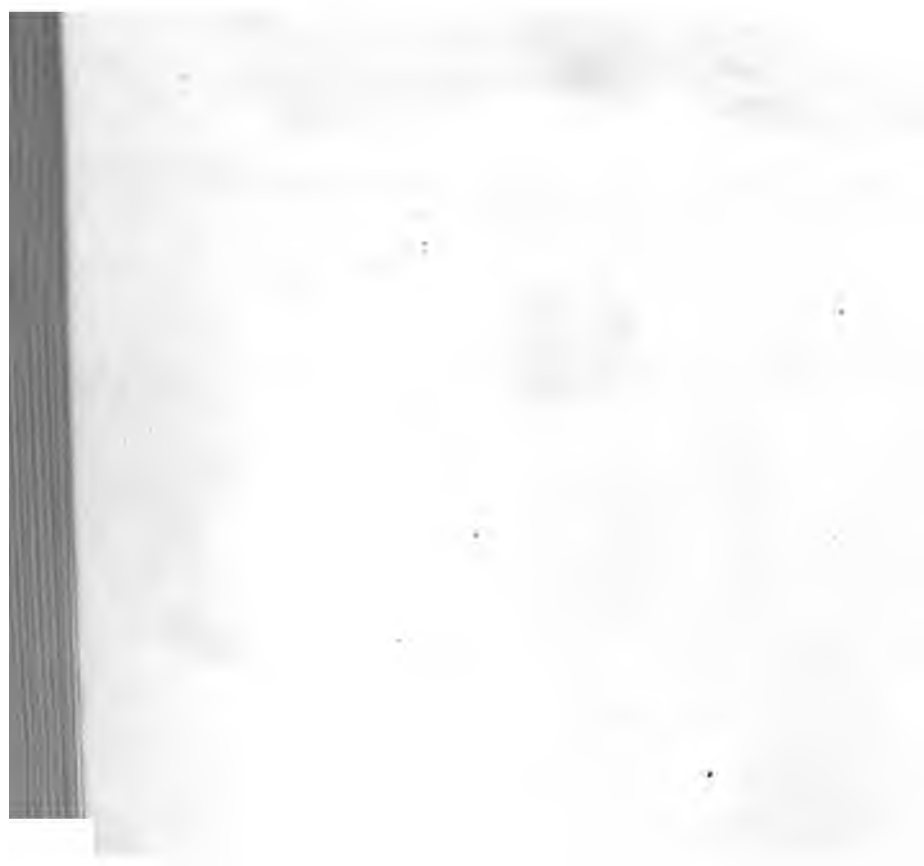
The term of imprisonment to the State prison commences with the day on which sentence is pronounced.

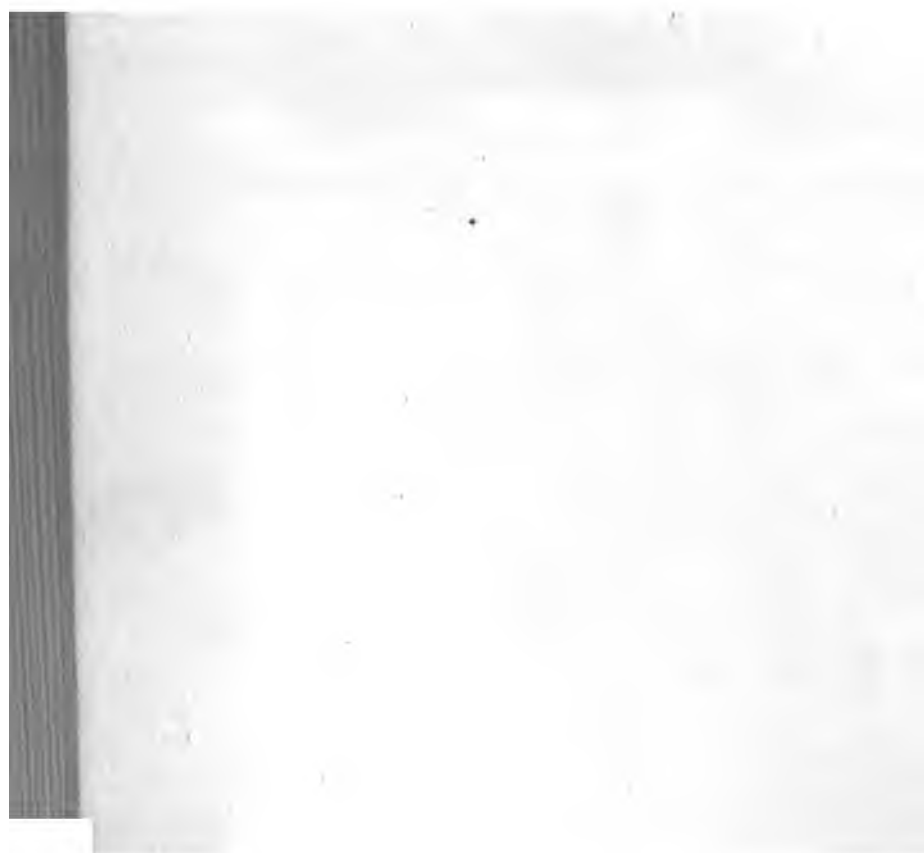
The statute provides for the discharge on bail of a prisoner under sentence upon the order of the Judge granting a stay of proceedings and the allowance of a writ of error. *Miller vs. the State of Florida* 575

Writ of Error—See title Criminal Practice—*Habeas Corpus*.









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